A

CONCISE TREATISE

ON

THE STATUTE LAW

OF THE

LIMITATION OF ACTIONS.

With an Appendix of Statutes,

COPIOUS REFERENCES TO ENGLISH AND AMERICAN CASES,
AND TO THE FRENCH CODE,

AND A VERY FULL INDEX.

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PREFACE.

The Author has endeavoured in this work to give a short outline of the Law of the Limitation of Actions as it exists under the numerous Statutes dealing with the subject as judicially interpreted. The work, which has been one of much labour, and which the author hopes may be of some use in the profession, is chiefly the result of a careful investigation of the principal reported cases affecting the subject which have arisen in the Courts of Law and Equity in England and America. These cases are for the most part cited in the volume, and amount to nearly one thousand in number. The author has endeavoured as far as possible to leave no statement of law unsupported by a judicial decision, and in quoting from important cases he has, so far as is consistent with due brevity, employed the *ipsissima verba* of the tribunal. In prosecuting his researches, and still more in verifying

their results, he has to acknowledge the valuable assistance he has received from the following modern works, viz.: Angell on Limitations; Blanchard's Law of Limitations; Brown's Law of Limitation of Realty; Darby and Bosanquet's Statutes of Limitations; Shelford's Real Property Statutes; Smith's Leading Cases; Daniel's Chancery Practice; Seton on Decrees; Williams on Executors; Davidson's Precedents; Chitty on Contracts; Byles on Bills; and many others.

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ERRATA.

Page 40, marginal note, *for* "do not apply," *read* "does not apply."
Page 158, marginal note, *for* "reversion," *read* "reversions."

THE STATUTE LAW

OF THE

LIMITATIONS OF ACTIONS.

CHAPTER I.

INTRODUCTION.

Historical view of the law of limitations in England.

THE law of the limitations of actions in England applicable to questions of title or contract is entirely the creation of Statute. At Common Law there existed no period of limitation except in the single case of a fine with proclamations;[1] and the want of such a limitation was supplied (where supplied at

[1] Originally the time allowed within which a stranger might make a claim after a fine with proclamations was a year and a day, but this was enlarged to a period of five years by the Statute 4 Hen. 7, c. 24. Cf. Co. Litt. 26 (a). Fines are now abolished, 3 & 4 Wm. 4, c. 74. The statement in the text seems to be now recognised. Cf. Angell's Limitation's, p. 11, and Blanshard, p. 4. The truth of the dictum of Bracton to the contrary, "omnes actiones in mundo infra certa tempora habent limitationem" (Bracton, Lib. 2, fol. 52) seems as doubtful as the Latinity. On the other hand torts were always subject to the rule expressed in the maxim, "actio personalis moritur cum personâ."

all) by a doubtful doctrine of presumption.[1] When legislation had become a necessity the Legislature did not at first fix any certain and progressive period within which actions should be commenced, but from time to time chose for that purpose certain Noteable times; and in this manner, by virtue of various Statutes, the beginning of the reign of King Henry the First, the return of King John from Ireland, the journey of Henry the Third into Normandy, and the coronation of King Richard the First were successively chosen, that suits and actions, the cause of which arose previous to their respective dates, should be barred.[2]

The early Statutes had reference to realty alone, and they were from their nature, though productive of immediate relief, merely of temporary advantage. At length, in the reign of Henry the Eighth, a more commodious course was taken, so that, in the words of Lord Coke, "by one constant law certain limitations might serve both for the time present and for all times to come."[3] This was

[1] 1st Rep. Real. Prop. Commissioners, p. 39. It has been suggested that trial by Wager of Law allowed in actions of debt also acted as a check to state demands. By this method a defendant was allowed to clear himself by the oath of himself and of eleven compurgators. Something analogous to the Wager of Law seems to be preserved in the Code Napoléon, but with the opposite intention of preventing the abuse of the law of limitations. Co. Civil. 2275.

[2] Hale's Common Law, 6th Ed. p. 152. Cf. Co. Litt. 114 (b), 115 (a).

[3] 2 Inst. 95.

effected by the Act of 32 Henry 8, cap. 2, "a profitable and necessary statute,"[1] by which the limitation of time in every case was reduced to a fixed interval between the accrual of the right and the commencement of the action. The intervals so fixed were in the various cases periods of fifty, sixty, and thirty years. This permanent and effectual method of limitation was adopted in all subsequent Acts.[2]

Adverse possession.

The beneficial Statute of James, which applied to personal actions as well as to realty, remained for a length of time the principal Act of Limitation affecting land, as it still remains the principal Act regarding simple contracts. But real property has been the subject of more frequent legislation. The most important Act was that passed in the reign of William the Fourth.[3] By that time the construction of the Act of James in regard to realty had become involved in almost hopeless confusion, especially with regard to the old doctrine of adverse possession,[4] and in the year 1833, in compliance with a

[1] Co. Litt. 115 (a).

[2] There is one exception. In the Statute, 21 James I., c. 16, the rights of the crown were to be barred at the expiration of 60 years from the beginning of the then session, viz., the 19th of February, 1623. The limit of legal memory, as is well known, still dates from the time of Richard 1.

[3] 3 & 4 Wm. 4, c. 27. See Appendix.

[4] Cf. the remark of Lord Mansfield, "The more we read the more we shall be confounded." *Taylor d. Atykns* v. *Horde*, 2 Smith's L. C.; 1 Burr, 60.

recommendation of the Real Property Commissioners, the whole law on the subject was ultimately remodelled by the important Statute, 3 & 4 Wm. 4, c. 27. This Act, though it has not escaped (as will be seen) the vice of ambiguity which seems destined to follow legislation on the subject, and which is perhaps due in part to the apparent simplicity and real complexity of the questions that arise, has greatly simplified the law by, amongst other things, abolishing in the old sense of the expression, the doctrine of adverse possession. A recent Act, which has not as yet come into operation, has reduced the different periods of limitation in length, but has in other respects for the most part left undisturbed, or has re-enacted afresh, the provisions of the Act of William the Fourth.[1]

The Statutes of Limitations are statutes of repose.

Statutes of Limitation have been termed statutes of repose[2] and opinion, professional and general, has been in favour of a continuous augmentation of their stringency. This feeling, so far as regards real property, has been much increased of late years by the desire generally felt by the legal profession and by the public to abridge the length of abstracts and to simplify the deduction of titles, a result which it has been thought may be partially at least obtained

[1] 37 & 38 Vict. c. 57. See Appendix.

[2] 3 Brod. & Bing. 222. Cf. such expressions as, "The statute of limitations on which the security of all men depends ought to be favoured." 2 Salk. 421. They may, however, be viewed otherwise, and have been termed "Improborum præsidium." See Evans' Pothier, s. 657.

by a strict law of limitation.[1] The result has been the recent Act,[2] which has diminished by nearly a half the length of time allowed for the recovery of land. There can be little doubt that the policy of the laws of limitations is good, but they may at the same time be productive of individual hardship, and it must be remembered that though their policy is one to be encouraged, yet they are Acts which take away existing rights, and which should therefore not be unnecessarily stringent, and should be construed with reasonable strictness.[3]

Principles on which law is founded.

The principles upon which laws of limitation and prescription are founded depend, according to Pothier, in part upon the presumption of payment or release arising from length of time, inasmuch as it is not common for a creditor to wait so long, and prescriptions are founded on the ordinary course of things, "*ex eo quod plerumque fit*," and partly also

[1] However, the fact that an extreme period of 40 years was fixed by the real property limitation Act of Wm. 4 did not alter the rule which requires a 60 years' title from a vendor. "One ground of the rule was the duration of human life, and that is not affected by the statute." *Per* Lord Lyndhurst in *Cooper* v. *Emery*, 1 Phill. C. C. 388.

[2] See Appendix.

[3] See *per* Kindersley, V.-C., in *Edmunds* v. *Waugh*, L. R. 1 Eq. 421. In America it was questioned whether the enactment of laws of limitation would not be unconstitutional as interfering with the rights of property guaranteed by the paramount laws of the constitution; but it has (as might be conceived) been decided that to make or repeal them is not unconstitutional except so far as they are made (or repealed) retrospectively. Angell, 22 (n. 2), and cases there cited.

because a debtor ought not to be obliged to take care for ever of his acquittances, which prove a demand to have been satisfied, and it is proper to limit a time beyond which he shall not be under the necessity of producing them.[1] They are too, according to the same authority, partly established as a punishment for the negligence of the creditor. The law having allowed him a time to institute his action, the claim ought not to be received when he has suffered that time to elapse.[2] In the great variety and complexity of the questions which arise on this subject there are yet some general rules of almost universal application, which may serve as guides, and which it may be well to notice at the outset of this treatise.

1st Rule. Time having commenced to run will not stop.

One of the most important and universal rules (which is not, however, without exception in English law[3]) is that time, when it has once commenced to run in any case, will not cease to do so by reason of any subsequent event which may be within the saving of the Statute.[4] Of this there is a well-known instance drawn from the time of the English civil wars. In answer to a plea of the Statute, the plaintiff replied that a civil war had broken out, and that the government was usurped by certain traitors and rebels, which hindered the course of justice, and by which the courts were shut up, and that within six years

[1] Evans' Pothier, 644.
[2] Ibid.
[3] See Index.
[4] Powell's Analysis of American Law, p. 410.

after the war ended he commenced his action, and yet his replication was held to be bad;[1] and in confirmation of this doctrine we find an Act of Parliament of 1 William & Mary whereby it is expressly enacted that the interval that elapsed from the day of the departure of King James, on the 10th December, 1687, till the assumption of the government by King William, on the 12th of March, 1688, should not be accounted any part of the time within which any person by virtue of the Statute of Limitations might bring his action.[2]

Thus, it is no answer to a plea of the Statute that, after the cause of action accrued, and after the Statute had commenced to run, the debtor within the six years died, and that (by reason of litigation as to the right of probate) an executor of his will was not appointed until after the expiration of six years, and that the plaintiff sued such within a reasonable time after probate granted.[3] And in *Doe d. Duroure* v. *Jones*[4] Lord Kenyon says, "I never heard it doubted whether, when any of the Statutes of Limitations had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on one of those Statutes it would also on others. I am clearly of opinion on the words of the Statute of Fines, and on the uniform construction of all the Statutes of

[1] Bac. Abr., Lim., 238, E. 6.
[2] Bac. Abr., Lim., 238, E. 6.
[3] *Rhodes* v. *Smethurst*, 4 M. & W. 42. Ibid., on appeal, 6 M. & W. 357.
[4] 4 T. R. 300.

Limitations down to the present moment, and the generally received opinion of the profession on the subject, that the question ought not to be disturbed."

2nd Rule. The bar of the Statute must be opposed by the debtor.

Another general rule of great practical importance which it is necessary to bear in mind is, that that the bar of the Statute must be opposed by the diligence of the debtor, and as early as possible,[1] and usually on the pleadings previously to the hearing, and that it will not be raised by the Court unsolicited;[2] and also that the protection afforded by the Statute may be waived by the debtor, the best possible proof of such waiver being a payment. It is probable, however, that this second rule is applicable solely to cases where by the Statute the remedy only, not the right, of a plaintiff is destroyed, a distinction, as will be seen hereafter, of considerable importance.

3rd Rule. The Law of Limitations is a part of the *lex fori*.

It is a rule that personal contracts are to be interpreted according to the law of the place where they are made. It is a rule equally well settled, that remedies on contracts are to be regulated and pursued according to the law of the place where the action is instituted, and not by the law of the place of the contract. The reason of this rule, according

[1] In France the objection may be taken at any stage: Code Civil. 2224.

[2] Evans' Pothier, 657. The law on this point is the same in France. See Code Civil. 2223. "Les juges ne peuvent pas supplier d'office le moyen résultant de la prescription."

to Mr. Justice Story, is obvious. "Courts of law are instituted by every nation for its own convenience and benefit, and the nature of the remedies, and the time and manner of the proceedings, are regulated by its own views of justice and propriety, and fashioned by its own wants and customs. It is not obliged to depart from its own notions of judicial order from mere comity to any foreign nation. As a rule, Statutes of Limitation are to be considered to fall within these remarks. They go *ad litis ordinationem*, not *ad litis decisionem*. In cases, therefore, where an action is brought in one country upon a contract made in another, a plea of the Statute of Limitations existing in the place of contracts is not a good bar, but a plea of the Statute existing in the country where the action is brought is a good bar.[1]

It may be, however, that there is a distinction, as suggested by Justice Story in his Conflict of Laws, and as suggested in reference to the preceding rule in cases where the right as well as the remedy of the claimant is barred by the law existing at the place of contract.[2] This, however, is not perhaps a frequent case in regard to personal actions. In all cases touching realty the *lex rei sitæ* prevails.[3]

[1] *Le Roy* v. *Crowninshield*, 2 Mason, U.S., p. 151; *Dupliex* v. *De Roven*, 2 Vern. 540; *Williams* v. *Jones*, 15 East.

[2] Story, 582.

[3] Story, 581. *Pitt* v. *Lord Dacre*, L. R. 3 Ch. D. 295.

CHAPTER II.

SIMPLE CONTRACTS.

At Common Law there existed, as we have seen, no limitation to the time within which an action *ex contractu* could be brought, notwithstanding a dictum of Bracton to the contrary.[1] In torts indeed the rule *actio personalis moritur cum personâ*[2] prevailed, and on the death of either party the right of action was at an end. But in actions arising out of contract the right of action descended, and might exist in the plaintiff's representatives against the representatives of the defendant for an unlimited time. At length, however, the Legislature interfered, and the Act of 21 James 1., c. 16, was passed, which remains still in force, and the principal Act regulating the limitation of actions upon simple contracts.[3] The 3rd section of this Act is as follows :—

"And be it further enacted that all actions of

[1] "Omnes actiones infra calum finem habere debent." Bracton, Lib. 2. There is an old maxim to the contrary of this sometimes quoted—"a right never dies."

[2] The application of this rule has been much diminished by late Statutes.

[3] See Appendix.

quare clausum fregit, all actions of trespass, detinue, action *sur trover* and replevin for taking away of goods and cattle, all actions of account and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding or imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed and not after; (that is to say), the said actions upon the case (other than for slander), and the said actions for trespass, debt, detinue and replevin for goods or cattle and the said action of trespass, *quare clausum fregit*, within three years next after the end of this present session of Parlialiament, or within six years next after the cause of such actions or suits and not after; and the said actions of trespass, assault, battery or wounding, imprisonment, or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions and not after; and the said actions upon the case for words, within one year next after the end of this present session of Parliament, or within two years next after the words spoken and not after."

Assumpsit though omitted in the words is within the spirit of the Act.

This Act, like its later brethren, has been the subject of much judicial criticism. And notwithstanding its beneficial operation and great practical utility, it has been described as being "unfortunately worded very loosely."[1] In particular, there is no mention in the Act of perhaps the most important action of all, that of *assumpsit*. But the omission is clearly unintentional,[2] and it has been construed and settled by early cases that *assumpsit* is within the Act, inasmuch as it comes within the reason of the Statute and may also be fairly considered to be included in trespass on the case.[3]

The section is comprehensive.

The section thus read is very comprehensive, and comprises nearly all cases of contract not founded on specialty, and which indeed fall for the most part under the head of *assumpsit*. To attempt any complete enumeration would be useless. There are, however, some cases within this Statute which, as they fall less obviously within it, it may be well to particularise. Thus *assumpsit* upon foreign judgments is within the section, inasmuch as, if a man recovers a judgment in France or any other foreign country for money due to him, the debt will only rank in this country as a simple contract debt for the purpose of the Statutes of Limitation,[4] and this

What are simple contracts.

[1] *Per* Parke, B., in *Inglis* v. *Haigh*, 8 M. & W. 769, 779.

[2] *Per* Denman, C.J., in *Pigyot* v. *Rush*, 4 Ad. & Ell. 912.

[3] *Harris* v. *Saunders*, 4 B. & Cress. 411. Bac. Abr., Limitations, E. 1.

[4] *Dupleix* v. *De Roven*, 2 Vern. 540.

is so even with regard to Irish judgments and since the Union.[1]

Bills of exchange, solicitor's fees, &c.

It was early decided that actions of *assumpsit* on bills of exchange and promissory notes were within the section.[2] Actions by attorneys to recover their fees are within the section, for though the status of an attorney is "of Record" yet his fees are not of Record.[3] But the lien of a solicitor on deeds in his possession for his costs may of course remain after the statutory period.[4] Actions of *assumpsit* by a bankrupt's assignees under the old laws were held within the section, on the ground that, notwithstanding that the assignment was by Act of Parliament, yet the assignees could only stand in the bankrupt's place, and have what right and remedy he had.[5] Money lent on a deposit of title deeds creates only a simple contract debt; but this is subject of course to the question of lien.[6]

Deposits with bankers.

The liability of an equitable assignee of leaseholds for the covenants thereon is within the section.[7] The ordinary dealings of bankers and customers also fall within the section, inasmuch as

[1] *Harris* v. *Saunders*, 4 B. & C. 411.

[2] *Chievly* v. *Bond*, 4 Mod. Rep. 105.

[3] *Oliver* v. *Thomas*, 3 Levin, 367.

[4] *In re Broomhead*, 5 D. & S. 52.

[5] Bac.Abr., Lim., E.1. *South Sea Co.* v. *Wymondsell*, 3 P. W. 144. And see Index, S. C. Bankruptcy.

[6] *Brocklehurst* v. *Jessop*, 7 Sim. 438.

[7] *Sanders* v. *Benson*, 4 Beavan, 450.

sums paid to the credit of a customer with his banker, though usually called deposits, are in truth loans to the banker,[1] and it is a fallacy to liken the dealings of a banker to the case of a deposit, to which, in legal effect, they have no sort of resemblance, as money paid into a banker's becomes at once part of his general assets, and he is merely a debtor for the amount. In fact, money deposited with a banker by his customer in the ordinary way is money lent to the banker, with a superadded obligation that it is to be paid when called for by cheque, and consequently if it remains six years without payment of principal or interest, the right to recover it is barred. And this is the case even although there be an agreement to pay interest, which it is the banker's duty (though in the case subjoined it was omitted) to enter duly to his customer's credit.[2] And this is so notwithstanding that the debt of a bank to customers is one of a special nature, and one for which no action can be brought without a previous demand.[3] It is, however, necessary to remark that, in *Pott* v. *Clegg*, Pollock, C.B., suggested a doubt whether the ques-

[1] *Foley* v. *Hill*, 1 Phill. 399; *Pott* v. *Clegg*, 16 M. & W. 321; *Carr* v. *Carr*, 1 Mer. 541 (*n*); *Devayne* v. *Noble*, 1 Mer. 568.

[2] *Pott* v. *Clegg*, 16 M. & W. 321; *Foley* v. *Hill*, *ubi supra*. But in *Foley* v. *Hill* there was no charge in the bill that the bankers had fradulently or through gross carelessness omitted their duty to enter the interest.

[3] Pothier on Contracts, quoted in *Pott* v. *Clegg*, 16 M. & W. at p. 325.

tion was not one for a jury to decide whether money so lent were a loan or deposit.[1]

Exceptions if bankers have notice of trust or deposit in specie.

The case is, however, different where the banker has notice that the fund is a trust fund, even though he has no notice what are the particular trusts.[2] And again, in the case of money deposited in a sealed bag, or which may otherwise be earmarked and recovered in specie.[3]

The liability of a solicitor for money of his client come to his hands, in the absence of fraud, is simply that of an agent or factor, and creates a simple contract debt only.[4] But where the plaintiff claimed against his solicitor for money received on his behalf, the Statute was not considered a bar to the summary jurisdiction of the Court.[5] An action for mesne profits is considered within the Act.[6]

Money due by custom.

Money due by virtue of a custom is within this Act.[7] So, too, may be an action grounded on a bye-law made by a company under its charter or Act of Parliament; on the ground, apparently, that though in one sense a bye-law is grounded on the

[1] *Pott* v. *Clegg*, *ubi supra*.

[2] *Bridgman* v. *Gill*, 24 Beav. 302.

[3] *Carr* v. *Carr*, 1 Mer. 541 (*n*); *Devayne* v. *Noble*, Ibid., 568.

[4] *In re Hindmarsh*, 1 Dr. & Sw. 129; *Burdick* v. *Garrett*, 5 Ch. 233; *Watson* v. *Woodman*, L. R. 20 Eq. 731. And see *infra*.

[5] *Ex parte Sharp*, W. W. & D. 354.

[6] *Reade* v. *Reade*, 5 Vesey, 749.

[7] *Mayor of London* v. *Gorry*, 2 Levin. 174. *S. C. as City of London* v. *Goree*, 1 Ventr. 298; *Tobacco Company* v. *Loder*, 16 Q. B. 765.

statute or charter which authorises it, yet it only operates against an individual by virtue of his own assent.[1]

Actions of trover and of replevin are within the Statute of James.[2]

The fact that a creditor has collateral security for a simple contract debt will not prevent the debt from becoming barred (as respects other remedies), though he will, of course, retain his lien upon the security.[3]

Actions to recover damages for torts, inasmuch as they are *quasi e contractu*, are within the Act.[4]

Cases not within this Act.

Actions grounded upon a Statute or a matter of record, or on any specialty are specialty debts, and not within this Statute. Thus an action of debt by a railway company against one of its members, under the Companies Clauses Consolidation Act (8 & 9 Vict., c. 16) and its special Act, is an action founded upon a statutory liability, and therefore a plea that the action is founded upon contract without specialty, and that the alleged cause of action did not accrue within six years before suit, is a bad plea, the proper limitation to such an action

[1] *Barber Surgeons of London* v. *Pelson*, 2 Lev. 252; *Feltmakers' Co.* v. *Davis*, 1 Strange, 385.

[2] *Swayn* v. *Stevens*, Cro. Car. 245.

[3] *Higgins* v. *Scott*, 2 B. & Ad. 413.

[4] *Cork and Bandon Railway Co.* v. *Goode*, 13 C. B. 826; *Shepherd* v. *Hills*, 11 Exch. 55, 67; *Jones* v. *Pope*, 1 Wm. Saunders, 37.

being twenty years by the 3 & 4 Wm. 4, c. 42, s. 3.[1] And this may be so even when the action is remotely so grounded. There is, however, a distinction as to actions grounded upon a statute as to whether they are so grounded directly or indirectly, and in the latter case they are not within the exception.[2] Thus, a debt for escape under 1 Rich. 2, c. 12, is a specialty debt.[3] So is an action against a sheriff for money levied under a *fi. fa.*, because such action arises in a *maleficio*, and is chiefly grounded on Record;[4] but now actions for an escape, or for any money levied under a *fi. fa.* are provided for by 3 & 4 Wm. 4, cc. 42, 43, the limit being six years.[5] It has been unsuccessfully contended that attorney's bills are also so grounded on Record.[6]

A bond creates a specialty debt.[7]

Cases not within the Act.

An action for debt of a fine for a copyholder is not within the Act,[8] but now any fine due in respect of any copyhold estates must be recovered within six years under the 3 & 4 Wm. 4, c. 42.[9] Neither is an action for debt for arrearages of rent reserved on an indenture of demise within the Statute of James;[10] but this case has also been provided for by a later

[1] *Cork and Bandon Railway Co.* v. *Goode*, *ubi sup.*

[2] *South Sea Co.* v. *Wymonsell*, 3 P. W. 144.

[3] *Jones* v. *Pope*, 1 Levin, 191. See 1 Siderfin, 306; and 1 Siderfin, 415.

[4] *Cockram* v. *Welby*, 2 Mod. Rep. 212, where, however, Scroggs, J., dissented.

[5] See Appendix.

[6] See *supra*, p. 13.

[7] Blansh. 92.

[8] Bac. Abr., 228, D. 1.

[9] See Appendix.

[10] Bac. Abr., 227, D. 1.

statute.[1] A warrant of attorney does not in itself create a specialty debt.[2] An action for debt upon the 2 & 3 Edward 6, c. 13, for not setting out tithes was held not within the Act,[3] but the time for the action is limited to six years by the Statute 53 Geo. 3, c. 127, s. 5.

Award.

An action upon an award to which the submission is by specialty is clearly grounded upon a specialty; and even where the submission was not by specialty, it was considered that an action upon the award was not within the Act.[4] That case was decided partly on the ground, that inasmuch as the award was under hand and seal of the umpire, there was sufficient specialty to prevent the Statute, and partly on the ground that the action was not founded on any lending or contract within the wording of the Statute, but now, by the Act 3 & 4 Wm. 4, c. 42, s. 3, all actions of debt upon any award, where the submission is not by any specialty, must be brought within six years after the cause of action.

Seamen's wages.

It was doubted whether in a suit in the Admiralty for mariner's wages this Statute was a good plea, it being said that it was a matter properly determinable at common law, and that the allowing the Admiralty

[1] 3 & 4 Wm. 4, cap. 27, s. 40.

[2] *Clarke* v. *Figes*, 2 Stark. 234.

[3] *Talory* v. *Jackson*, Cro. Car. 513.

[4] *Hodson* v. *Harridge*, 1 Levin, 273. Williams' Notes to Saunders, vol. ii. p. 150; 1 Siderfin, 415.

jurisdiction therein was only a matter of indulgence ;[1] but this is now settled by the 4 & 5 Ann., c. 16, by which it is enacted, "That all suits and actions in the Court of Admiralty for seamen's wages shall be commenced and sued within six years next after the cause of such suits or actions shall occur, and not after."

There is no limitation at common law to criminal procedure by indictment.[2]

[1] Bac. Abr., Lim., D. 4.
[2] *Dover v. Maestaer*, 5 Esp. 92.

CHAPTER III.

SIMPLE CONTRACTS—WHEN TIME BEGINS TO RUN.

When time begins to run.

By section 3 of the Statute of James it is enacted that the different periods within which the remedies for the cases provided for are to be pursued are to be reckoned (except as to slander) from the time of the respective causes of action. This, indeed, would probably be so independently of the statutory direction. It becomes, therefore, necessary in each case to consider with reference to the Statutes of Limitation at what time the cause of action arose, a question which is not seldom one of difficulty. Thus, adopting the rule that a cause of action, or, as it is sometimes further laid down, a complete cause of action, is the necessary point of commencement, time will not commence to run in case of a contingent promise till the event has happened on which the contingency depends. Thus, if a man promise to pay 10*l.* to J. S. when he comes from Rome, and ten years after J. S. returns from Rome, the right of action accrues upon the happening of that contingency, and from that time the Statute will commence to run, and not from the earlier date of the promise.[1]

[1] Bac. Abr., Lim., 230, D. 3; *Savage* v. *Aldren*, 2 Stark. 232.

Poverty of defendant.

And time will commence to run in the defendant's favour from the date when a cause of action accrued, even though from any cause (such as poverty of the defendant) an action would then have been fruitless.[1] And a cause of action accrues when work is done, though it may be that the parties cannot get satisfaction till afterwards,[2] though, of course it may be otherwise where there is a special contract as to time of payment.[3] So in cases of mistake, time runs from the date of the mistake, not from the date of discovery. Thus, when a personal representative found among the papers of the deceased a mortgage deed, and assigned it more than six years before the action for the mortgage money, reciting in the deed of assignment that it was a mortgage deed made, or mentioned to be made between the mortgagor and mortgagee for that sum, the assignee was not allowed to recover, though it turned out that the mortgage deed was a forgery, and the assignee did not discover the forgery till within six years before the action.[4]

Request.

Again, where a defendant promises to pay upon request, a complete cause of action will not accrue till the request is made. Thus, in an action on the case wherein the plaintiff declared that in considera-

[1] *Emery* v. *Day*, 1 C. M. & R. 245, but see also under Torts.

[2] *Wormwell* v. *Hailstone*, 6 Bing. 668.

[3] *Wittersheim* v. *Lady Carlisle*, 1 H. Bl. 631.

[4] *Bree* v. *Holbech*, 2 Doug. 654.

tion that he would forbear to sue defendant for some sheep killed by defendant's dog, defendant promised he would make satisfaction, upon request, it was held that the right of action accrued from the request, and not from the killing of the sheep.[1]

Goods sold.

In the ordinary case of goods sold the cause of action arises on the delivery to the purchaser in the absence of a special contract, but if credit is given for a fixed period to the purchaser then the cause of action will not arise till the expiration of the credit.[2] Where goods were sold at six months' credit, and payment was then to be made by bill at two or three months, at the option of the purchaser, it was held (Parke, J., *dubitante* as to the last two or three months), that the transaction, in fact, amounted to a nine months' credit, and that an action commenced within six years from the end of the nine months was commenced in time. The doubts of Mr. Justice Parke appear to have been caused by the fact that the vendor had a right to an immediate remedy against the purchaser for damages on his non-performance of his agreement to give a bill at the expiration of six months.[3]

Factors.

If goods are consigned to a factor for sale on commission or otherwise, there is an implied contract on the part of the factor to account for such goods as are sold, to pay over the proceeds to his

[1] Bac. Abr., Lim., 230, D. 3. & A. 431.
[2] *Helps* v. *Winterbottom*, 2 B. [3] Ibid.

principal, and to redeliver to him the residue remaining unsold upon demand, but no action will, as a rule, lie either for account or redelivery until demand; consequently time will not commence in such a case to run in the factor's favour previously to demand.[1] After a reasonable length of time, however, it seems a jury may presume a demand; but demand must be either proved or presumed to have been made.[2] The question, indeed, seems to depend on one of fact in each case, namely, how soon the factor has commenced to retain his principal's funds, either actually or constructively, as his own; in fact, at what time there has been a conversion by him to his own use, from which date, even without demand, time will commence to run in his favour.

It was decided in an American case,[3] in an action against an attorney for moneys he had collected on his client's behalf more than six years previously to the action, that the action was barred, notwithstanding that no demand had been made till within

1 "Demand must be either proved or presumed," *per* Heath, J., in *Topham* v. *Braddick*, 1 Taunt. 572. See *Clark* v. *Moody*, 17 Mass. R. 144, where the law of Factors is discussed at length, and *Collins* v. *Benning*, 12 Mod. 444.

2 *Topham* v. *Braddick*, *ubi supra*. In this case Lawrence, J., said he remembered a case where furniture had been left for a time exceeding the statutory period in a mansion house. In an action to recover it, the demand and refusal being recent, the Statute was pleaded unsuccessfully.

3 1 Rand. (Virg.) R. 284; *Hounsell* v. *Gibbs*, 1 Bail (S. C.), 482.

such six years. And it was intimated that though the attorney could have protected himself from a suit on the ground of absence of demand, yet that the rule was so made entirely for the benefit of the attorney, and that he ought not therefore to be subject all his life to demands, however stale.[1]

Failure of consideration.

Where an annuity granted to a purchaser was invalid against the grantor by reason that the memorial was incomplete under the then existing Annuity Acts, it was held that there were two

Void annuity.

requisites to give a good cause of action to the grantee for the purchase money. Firstly, the payment by him of the money; and, secondly, the election by the grantor to take advantage of the defect in the memorial; and that until both happened the Statute would not commence to run in favour of the grantor.[2] The same reasoning would seem applicable to any conveyance void in form or through non-compliance with Statute obligations. Where the purchase money given for an annuity was sought to be recovered by the buyer of the annuity, on the ground that part of the security for the annuity had failed, time was held to have commenced to run in favour of the seller of the annuity from the date of the failure of the security, and not previously from the date of the payment of the purchase money.[3]

Joint purchasers.

It was held in an American case, where there had

[1] *Stafford* v. *Richardson*, 15 Wend (N.Y.) R. 302.

[2] *Cowper* v. *Godmond*, 9 Bing. 748.

[3] *Huggins* v. *Coates*, 5 Q. B. 432.

been a joint purchase of goods and one of the purchasers took the whole goods and agreed to account to the other for his share, or the nett proceeds, that the Statute began to run in the defendant's favour so soon as he had rendered an account of the goods sold.[1]

Bills and notes.

Time begins to run on a bill or note when the right of action accrues independently of the question whether the action would then be fruitless.[2]

On a promissory note, payable at a fixed period after date, time will not commence to run till that date, notwithstanding that the notice is only evidence of an account stated.[3]

Where a promissory note was given to bankers to be delivered to the payee upon his producing and cancelling another note, it was held that the cause of action did not accrue till delivery of the first note to the payee by the bankers.[4]

A cheque is an inland bill of exchange, and if a loan be made by means of a cheque a cause of action does not arise against the debtor till the cheque is cashed. In *Carden* v. *Bruce*,[5] a cheque for 45*l.* was given as a loan to the defendant on the 14th June, 1861. The defendant paid it into his

[1] *Murray* v. *Coster*, 20 Johns. (New York) R. 576.

[2] *Emery* v. *Day*, 1 C. M. & R. 245; Byles on Bills. See *supra*, p. 21.

[3] *Wittersheim* v. *Lady Carlisle*, 1 H. Bl. 631; *Short* v. *M'Carthy*, 3 B. & Ald. 631.

[4] *Savage* v. *Aldren*, 2 Stark. 232.

[5] *Carden* v. *Bruce*, L. R. 3 C. P. 300.

bank on the day following and received credit for it. The defendant having omitted to endorse the cheque, though payable to order, it was returned to him for signature, and was not presented to the plaintiffs and paid by them till the 21st June, 1861. The writ was issued by the plaintiff on the 21st June, 1867. It was held by the Court of Common Pleas, as being too clear for argument, that the Statute was not a bar. The question, according to Keating, J., was, when could the plaintiff have first sued the defendant for money lent? And he was of the opinion that the plaintiff could not have done so till he had lent the money, which was when the cheque was cashed on the 21st June.

Instalments.

It seems, according to the decision in *Hemp* v. *Garland*,[1] that if a bill be made payable by instalments, with a provision that if one instalment fail the whole sum shall thereupon become due, the Statute will commence to run from the date of such default. It may be noticed, however, that it might be argued that this is at variance with the well-known rule, that no one is obliged to take advantage of a forfeiture,[2] a point which does not appear to have been noticed in the argument.

Usually, when a debt is payable by instalments, time commences to run as regards each instalment at the time when it separately becomes due.[3]

No debt accrues on a bill payable *after sight* until

[1] 4 Q. B. 519.

[2] See Index, S. C., Forfeiture and Annuity.

[3] Evans' Pothier, 404.

presentment. Therefore the Statute is no bar to an action on such a note unless it has been presented for payment six years before the action, the expressions after date and after sight not being synonymous.[1]

A bill or note, however, payable at sight or on demand is payable immediately, and presentment or demand is not a condition precedent to payment.[2] So that the Statute will commence to run immediately from the date of the note.

A bill or note payable *after* demand or *after* notice is not payable till demand made or notice given.[3] Thus, in *Thorpe* v. *Booth*, the Statute was held not to be a bar to an action on a promissory note payable twenty-four months after demand, which had been made long previously but presented for payment within six years before the action was commenced.[4]

Fraud.

At law fraud was no bar to the Statute of Limitations; and a special replication of concealed fraud would not suffice to avoid such a plea.[5] Thus it

[1] *Holmes* v. *Kerrison*, 2 Taunt. 323; *Sturdy* v. *Henderson*, 4 B. & Al. 592; *Sutton* v. *Toomer*, 7 B. & C. 416.

[2] Byles on Bills, 11 Ed. p. 342. See, however, note (*a*) Ibid., and cases there cited.

[3] *Thorpe* v. *Booth*, Ryan & M. 388; *Clayton* v. *Gosling*, 5 B. & C. 360.

[4] *Ubi supra.*

[5] *Brown* v. *Howard*, 2 Brod. & Bing. 73. This proposition has, however, been denied. See *Bree* v. *Holbech*, Doug. 654; *Short* v. *M'Carthy*, 3 Barn. & Ald. 626. The question is considered doubtful in America. Angell, 5 Ed. 185.

has frequently happened that the owner of a coal mine has taken coal from an adjoining mine and by fraud prevented it from being found out for more than six years, yet this has been no answer to a plea of the Statute; but fraud has always been ground of relief in Equity, and it is presumed that now, under the Judicature Acts, 1873 and 1875, it is so also at law.[1]

Accommodation bills.

On the contract which the law implies on accommodation bills to indemnify the acceptor the Statute commences to run from and not before his damnification. "In the ordinary case of an accommodation acceptance the cause of action accrues when the plaintiff is damnified."[2] Similarly, upon a contract to indemnify the plaintiff against costs which he was afterwards called upon to pay, the cause of action was considered to accrue when he paid the costs, not when they accrued, nor when the bill was delivered.[3] And generally in the case of a guaranty, when a person is called upon to pay the debt of another, time does not run in that other's favour till the actual payment.[4]

An acceptor may retain money to meet his accep-

[1] 36 & 37 Vict., c. 66, s. 25; and see Index, c. 6, S. C., Fraud.

[2] *Per* Maule, J., in *Reynolds* v. *Doyle*, 1 M. & Gr. 753; *Collinge* v. *Heywood*, 9 Ad. & E. 633; *Spoor* v. *Green*, L. R. 9 Ex. 99. But see *Webster* v. *Kirk*, 17 Q. B. 944.

[3] *Collinge* v. *Heywood*, 9 A. & E. 633. But see *Bullock* v. *Lloyd*, 2 Carr. & P. 119.

[4] *Angrove* v. *Tippett*, 11 L. T. N. S. 708, Q. B.

tances, although they are barred by a Statute of Limitation.[1]

In the case of post obit bonds time commences to run on the death of the person to whose life the charge is subject,[2] and generally, where a sum is payable upon a contingency, time begins to run on the happening of the event.[3] Torts.

In torts time commences to run from the date of the misfeasance, not from the time when damage is occasioned. That this is so, and that the period of limitation begins to run from the time and as soon as the injurious act is effected and perpetrated, although the actual injury and damage are subsequent and could not immediately operate or become known, is laid down as an established principle by an eminent writer.[4] The rule seems, however, to admit of possible qualification. Thus it has been laid down, both in England and America, that there are cases where, though trover may be brought immediately, yet the injured party may bring trespass or trover, or may waive both and bring assumpsit for the proceeds when the property has been converted into money; and that, in the last case, the tort-feasor cannot allege his own wrong so as to bring time back to the date of the tort,[5] but there

Time runs from wrong doing not from time of damage.

[1] *Kerrison* v. *Williams*, 3 Carp. 418.

[2] *Tuckey* v. *Hawkins*, 4 C. B. 655.

[3] *Fenton* v. *Imblers*, 3 Burr. 1278.

[4] Powell's Analysis of American Law, 40.

[5] *Hony* v. *Hony*, 1 Sim. & Stu. 568; *Lamb* v. *Clark*, 5 Pick. (Mass. R.) 193; *Lamine* v. *Dorrell*, 2 Ld. Raymond,

must be some actual conversion.[1] However, the general rule seems to be as stated above. Thus, in *Battley* v. *Faulkner*,[2] a case of special damage for delivery of bad wheat, Abbott, J., said that it would be extremely dangerous to enquire in every case the precise period of time when damage first came to the knowledge of the plaintiff, and in many instances would deprive the defendant of the benefit of the legislation. And, in the same case, Bayley, J., observed that the special damage was merely a measure of damages.

Solicitor's negligence.

The principal rule is illustrated in *Whitehead* v. *Howard*,[3] where an action was brought against a solicitor who had been guilty of gross negligence. In this case Burroughs, J., observed that the time for bringing an action had long gone by, twelve years having elapsed from the preparation of the insufficient security and six years from discovery of the insufficiency; but in this case the question was not directly raised. In *Howell* v. *Young*,[4] an important case upon the question, the defendant, an attorney, retained by the plaintiff, in the year 1844, then represented to the plaintiff that certain pro-

Howell v. Young.

1216; *Hitchin* v. *Campbell*, 2 W. Bl. 827; *Hambly* v. *Trott*, Cowp. 371.

[1] *Jones* v. *Hoar*, 5 Pick. (Mass. R.) 285.

[2] 3 B. & Ald. 288. See *Van Sandau* v. *Corsbie*, 3 B. & Ald. 13.

[3] 2 Bro. & Bing. 372; and Ibid., p. 73.

[4] 5 Barn. & Cr. 259; see *Fetter* v. *Beal*, 1 Salk. 11; *Gillon* v. *Boddington*, 1 R. & M. 161; *Sims* v. *Britton*, 5 Ex. 802; and *Crawford* v. *Gaulden*, 33 Ga. 173.

posed securities for an advance of a sum of 3000*l.* were sufficient. In the result they proved worthless, but this was not discovered by the plaintiff till the year 1850, after more than six years had elapsed from the making of the security. Interest had in the meantime been duly paid to the plaintiff. In this case, Bayley, J., said, "This is a case of no difficulty whatever. It appears to me that the misconduct of the defendant is the gist of the action. If the allegation of special damage had been wholly omitted the plaintiff would have been entitled to a verdict for nominal damages." In a subsequent and somewhat similar case,[1] where the defendant to a suit in Equity raised the defence of the Statutes of Limitations by demurrer, Vice-Chancellor Wigram said that he had endeavoured to ascertain whether the case of *Howell* v. *Young* was considered to be law in Westminster Hall, and had found it so considered, and he allowed the demurrer accordingly.

It should be noticed that no acknowledgment keeps up the right of the aggrieved party in cases of trespass and trover.[2]

If a defendant plead a set-off, the plaintiff may reply the Statute, but a set-off is available as a simultaneous cross-action would be, and if it is to be barred at all, must be barred at the time of the commencement of the action. Therefore, when to a plea of set-off the plaintiff replied that the cause

Set-off.

[1] *Smith* v. *Fox*, 6 Ha. 386.

[2] *Hony* v. *Hony*, 1 Sim. & Stu. 568.

of set-off did not accrue within six years of the plea, the replication was held bad.[1]

Owelty of partition.

In an action to recover money agreed to be paid for every owelty of partition, it was held in America that time did not begin to run till the making of a legal partition.[2]

Agreement to devise.

It seems that if a man make an agreement to devise a cause of action will not arise thereon till his death.[3]

The commencement of an action is issuing of a writ.

The commencement of an action is the issuing of the writ, and if an action be properly commenced in an Inferior Court and it be then removed into a Superior Court for the purpose of the Statute of Limitation, the action in the Superior Court will be considered to have been commenced at the date of the commencement of the action in the Inferior Court; not that the second suit is really a continuation of the first, but it is rather a matter of indulgence to the plaintiff who has properly attempted to pursue his remedy.[4]

Mistake in Court.

According to Pothier, though a process before an incompetent judge does not interrupt a prescription, nevertheless, when the question of competence may have been doubtful, the Court, in pronouncing the incompetence of the judge, sometimes refers the

[1] *Walker* v. *Clements*, 15 Q. B. 1046.

[2] *Walter* v. *Walter*, 1 Whart. (Penn.) R. 292.

[3] *Bash* v. *Bash*, 9 Barr. (Penn.) 260.

[4] *Bevin* v. *Chapman*, 1 Siderfin, 228; *Matthews* v. *Phillips*, 2 Salk. 424. But see *Manby* v. *Manby*, L. R. 3 Ch. D. 101, cited *infra*.

parties to the proper judge, with a direction requiring him to proceed between the parties, according to the state in which the proceedings were at the time of removing the process.[1] This doctrine seems consonant with sound sense, and a similar doctrine has in some cases been followed by our Court of Chancery, where it has been held that equity will prevent the bar of the Statute being set up at law in cases where time has run during proceedings in Chancery,[2] but the cases on this point are inconsistent,[3] and it is believed that in some recent and unreported cases no such relief has been allowed a plaintiff who has lost his remedy at law while endeavouring to pursue it in equity; but the question may now, perhaps, be of little importance, owing to recent litigation on the fusion of law and equity.

In a very recent case,[4] one J. Manby had become a debtor to the plaintiff for a sum of 1,181*l.* Interest was paid up to the date of the debtor's death, on the 19th of March, 1869. Administration was taken out by the defendant on the 28th of April, 1869, and the plaintiff, on the 7th of January, 1875, issued a writ in an action against the defendant, in the Common Pleas. On the 6th of

[1] Evans' Pothier, 662. *Sirdefield* v. *Price*, 2 Y. & J. 73.

[2] *Anon.*, 1 Vern. 74; *Sturt* v. *Mellish*, 2 Atk. 615.

[3] *Lake* v. *Hayes*, 1 Atk. 282; *Anon.*, 2 Atk. 1. See also under Equity.

[4] *Manby* v. *Manby*, L. R. 3 3 Ch. D. 101.

July, 1875 (after which day the writ would cease to be in force), the plaintiff took out a summons against the defendant for administration of the debtor's estate in Chancery. The administrator pleaded the Statute, and the plea was allowed with costs by Malins, V.-C., who said :—" The administrator says the cause of action, namely, the debt, arose more than six years before the commencement of this suit. The only answer is : Very true, it did occur six years before the commencement of this suit, but we had commenced a suit in another Court. But commencing the suit in another Court is in my opinion only a mode of keeping alive the debt in that particular action. I am therefore of opinion, that though in some sense the debt is kept alive by the writ, it was only kept alive for the purpose of being recovered in that particular Court in which the writ was issued. * * * I am therefore of opinion, that the Statute of Limitations is a complete answer to the claim, and that it therefore cannot be sustained, and must be dismissed with costs."

CHAPTER IV.

ACKNOWLEDGMENTS IN GENERAL.

THE reason for a statutory bar to claims obviously fails when the existence and justice of such claims are from time to time admitted by the persons against whom they are made. We naturally find, therefore, that, under most Statutes dealing with the subject, a sufficient acknowledgment will suffice, up to the time of such acknowledgment, to exclude the operation of the particular Statute, and, as it is conveniently termed, to "set time running again." And where such provision has not been expressly made in the Statute, Courts, even of Common Law, have found themselves at liberty beneficially to imply such a qualification to the rigour of the Statute.

Acknowledgments in general.

Where there is a statutory bar, and there is a statutory exception to that bar by an acknowledgment of a certain character, the acknowledgment must, to be effectual, be strictly in accordance with the wording of the Statute, and unfortunately in the several Statutes affecting the subject, the requirements for a sufficient acknowledgment are very various, and, it may almost be said, different in

each. In a case, then, when it is intended to rely upon the fact of an acknowledgment on the part of the defendant, to prevent his taking advantage of the bar of the Statute, it is necessary to consider carefully under what Statute that bar arose, and the particular wording of the exception provided by that Statute. Thus, under some Statutes an acknowledgment will be sufficient, if it be made by, and to an agent, in others *by*, but not *to*, and in others, again, *to*, but not *by* an agent. Before proceeeding to treat of the various cases in detail it may be well shortly to note the minute but important differences on this head in the various Acts.

Different requisites for acknowledgments; 3 & 4 Wm. 4, c. 27, s. 14.

Under 3 & 4 Wm. 4, c. 27, s. 14, an acknowledgment of the lawful owner's title, so far as concerns any land or rent, must be given to him *or his agent*, but not by the giver's agent. Under the same Statute, section 40, however, which concerns charges on lands and legacies, an acknowledgment may be given by the persons to whom such are payable, or his agent, to the person chargeable, or his agents. So that a valid acknowledgment may be given and received in such cases without the personal signature of the principals on either side. And the same is the case as to section 42, which deals with arrears of rent or interest on charges on land. By section 28, however, of the same Act, which deals with mortgages, an acknowledgment of the title of the mortgagor must be given to the mortgagor, or his agent by the mortgagee personally.

3 & 4 Wm. 4, c. 27, ss. 40-42.

3 & 4 Wm. 4, c. 27, s. 28.

By section 5 of the Act, 3 & 4 Wm. 4, c. 42, passed the same year, and dealing with specialties, an acknowledgment must be signed by the party liable or his agent, but it is not expressed to whom it is necessary that it should be given, and it may be, that if made to an agent of the covenantee, it would not be within the section. 3 & 4 Wm. 4, c. 42, s. 5.

At Common Law, where a person authorises another to sign for him, the signature of the person so signing is the signature of the person authorising it; but it is otherwise in cases under the Statute Law, which may require a personal signature.[1] And this is so with the Statutes of Limitation. It was held in *Hyde* v. *Johnson*,[2] that Lord Tenterden's Act (9 Geo. 4, c. 14) must be read in *pari materiâ* with the Statute of Frauds, and that upon the construction of those Statutes the Legislature must be taken to have intended a personal signature. It must, however, be remembered, that the Common Law rule *qui facit per alium facit per se* ought not to be restricted, unless the Statute expressly or by necessary implication requires a personal signature.[3] Rule as to signature by agents in general is not applicable.

In all cases of acknowledgment it is necessary to bear in mind the following requisites of a sufficient acknowledgment, and to consider whether they are Four general requisites of an acknowledgment.

[1] *Per* Blackburn, J., in *Queen* v. *Justices of Kent*, L. R. 8 Q. B. 307.

[2] 2 Bing. N. C. 776.

[3] *Per* Quain, J., in *Queen* v. *Justices of Kent*, *ubi supra*. See *Toms* v. *Cuming*, 7 M. & G. 88; *Swift* v. *Jewsbury*, L. R. Q. B. Ex. Ch. 301.

to be found in the particular case. These general requisites are as follows, viz. :—

1. The acknowledgment made must be in terms sufficient. 2. It must be made by the proper person. 3. It must be made to the proper person. 4. It must be made with the proper formalities (such as signature in writing), if any. And further, in cases affecting real property, where the right and not the remedy alone is destroyed, it must be seen that the acknowledgment is made before time has finally run in favour of the maker, so as to have made to him a statutory transfer of the property before his acknowledgment, in which case such an acknowledgment will be of no avail to the original lawful owner.

Having premised thus much generally as to acknowledgments, we shall proceed to consider separately the questions arising on the several Statutes of Limitation in respect of this point. As the rule in each Statute varies, it will be necessary, for the most part, to consider each by itself; though in fact decisions made upon one Statute may be often applicable to the consideration of another.

CHAPTER V.

SIMPLE CONTRACTS—ACKNOWLEDGMENTS.

Although the Statute of James does not contain any exception in case of acknowledgments of indebtedness by the debtor, yet the judges early read such an exception into that Statute. There has been a considerable change of opinion as to the exact nature and bearing of acknowledgment in cases under this Act.

Acknowledgments early admitted to avoid the Statute;

At first it was necessary in the opinion of the Courts that an acknowledgment, amounting to very nearly an express promise to pay, should be given in order to avoid the effect of the Statute.[1] Indeed, in one case, Pollexfen, C.J., went so far as to suggest that not only was a new promise required, but that it must be founded upon a new consideration.[2]

At first strictly;

Subsequently greater laxity prevailed. The principle of the rule of acknowledgment was mistaken, and it was supposed to rest upon the rebuttal afforded thereby of the presumption of payment of the debt, and not upon any renewal of the promise

then with greater laxity, due to mistaken theory of acknowledgment.

[1] *Bass* v. *Smith*, 12 Vin. Abr. 229; *Lacon* v. *Briggs*, 3 Atk. 105; *Williams* v. *Gun*, Fortescue, 177.

[2] *Bland* v. *Haselrig*, 2 Ventris, 151.

to pay. In this way any admission of a debt was sufficient to avoid the effect of the Statute, however indirect, and even if accompanied with an expression of intention not to pay.[1] In *Bryan* v. *Horseman*, a note of change was sounded by Ellenborough, C.J., who, in deciding that he was bound by previous authorities to follow the laxer rule, yet expressed an opinion that were the subject *res integra*, the matter might not be free from doubt. On the disadvantage of a too liberal extension of a doctrine of acknowledgment the following remarks were made by Gibbs, C.J., in *Hellings* v. *Shaw*,[2] "I agree that if the Courts could retrace their steps, and could recall the consequences that have arisen, they would have seen it better to adhere to the precise words of the Statute than to attempt to relieve in particular cases."

Theory of acknowledgments do not apply to torts.

The doctrine of acknowledgment applies only to cases founded upon assumpsit. If the gist of an action is the injury committed by the defendant, and the right of action is once barred by time, it is impossible to revive it by admission of indebtedness; and in the case of torts no acknowledgments will suffice to avoid the express words of the Statute.

[1] *Bryan* v. *Horseman*, 4 East, 599; *Frost* v. *Bengough*, 1 Bing. 266; *Clark* v. *Hougham*, 2 B. & C. 149; *Leaper* v. *Tatton*, 16 East, 420; *Dowthwaite* v. *Tibbut*, 5 M. & S. 75; *Mountstephen* v. *Brooke*, 3 B. & Ald. 41; *Scales* v. *Jacob*, 3 Bing. 688; *Partington* v. *Butcher*, 6 Esp. 66.

[2] 7 Taunt. 608.

Thus a promise to make compensation for a trespass committed in illegally taking away coals in a coal mine, was not sufficient to revive the cause of action.[1] This doctrine, together with the present received doctrine as to the theory of acknowledgments, namely, that an acknowledgment, to be effectual, must amount to a fresh promise to pay, is well shown in the judgment of Tenterden, C.J., in *Tanner* v. *Smart*.[2] "It is only in actions of *assumpsit*," said his lordship, "that an acknowledgment can be held an answer; and when, in the case of *Hurst* v. *Parker*, it was decided to be inapplicable to actions of trespass, Lord Ellenborough gave, what appears to be the true reason, that in assumpsit 'an acknowledgment of the debt is evidence of a fresh promise,' and that promise is considered as one of the promises laid in the declaration, and one of the causes of action which the declaration states. If acknowledgment had the effect which the cases in the plaintiff's favour attribute to it, one would have expected that the replication to a plea of the Statute could have pleaded the acknowledgment in terms, and relied upon it as a bar to the Statute, whereas the customary replication, ever since the Statute, to let in evidence of acknowledgment, is that the cause of action accrued (or the defendant made the promise) within six years. And the only principle upon which it can be held to be

Tanner *v.* Smart. Doctrine of acknowledgment is not founded on presumption of payment, but on implied new promise.

[1] *Hurst* v. *Parker*, 1 Barn. & Ald. 92.

[2] See 6 Barn. & Cr. 603, 605.

an answer to the Statute is this, that an acknowledgment is evidence of a new promise and, as such, creates a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, wherever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; where it does not so support them, (though it may show clearly that the debt never has been paid, but is still a subsisting debt), the plaintiff fails."

Acourt *v.* Cross.

A crucial test at length arose in the case *Acourt* v. *Cross*.[1] In that case the defendant had made an admission in the following terms:—"I know that I owe the money, but the bill I gave is on a three-penny stamp and I will never pay it." The decision in the case, which was in favour of the defendant, practically overruled a large course of intermediate decisions, and returned to something nearly approaching the strictness of the primitive construction of the Act. Best, C.J., in giving judgment, remarked, "I am sorry to admit that the Courts of Justice have been deservedly censured for their vacillating decisions on the 21 James 1, c. 16. When by distinctions and refinement which, Lord Mansfield says, the common sense of mankind cannot keep pace with any branch of the law is brought into a state of uncertainty, the evil is only to be remedied by going back to the Statute." However, it is not wholly

[1] 3 Bing. 329.

correct to say that an acknowledgement revives the previous debt. It rather, as has been seen, creates a new debt by virtue of an implied promise, yet it does none the less to a certain extent revive the previous debt so far as is sufficient to make it a good consideration for the new promise.

Phillips *v.* Phillips.

The present doctrine on the subject was explained with admirable clearness by Wigram, V.-C., in the case of *Phillips* v. *Phillips*,[1] as follows:—"The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense and for that purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise and not the old debt is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him."

Present theory.

It may now be said that the theory of acknowledgment is settled in a fairly satisfactory manner as to simple contracts on the principle that there is required either an express promise to pay the debt or an absolute admission of indebtedness from which a

[1] 3 Ha. 281, 300.

promise to pay may naturally be inferred,[1] which new promise is sufficiently supported by the consideration of the past debt.[2]

What amounts to an acknowledgment.

Having premised therefore that a clear admission of a debt is evidence, if unrebutted, of a new promise to pay sufficient to avoid the Statute, it follows that three questions will usually arise as to any alleged acknowledgment. Firstly, is there an admission of the debt in question. Secondly, if there is such admission, is it narrowed by any qualification which rebuts the presumption of a promise or subject to any condition on the fulfilment of which the implied promise is defendant. And thirdly, if there be such a condition, whether it has been satisfied. On the first question it seems that there is considerable liberality in construing a reference to a debt as an admission. Thus, where the admission was in the following terms, "I am ashamed the account has stood so long," it was held to be a good acknowledgment.[3] In *Edmonds* v. *Goater*,[4] the debtor wrote as follows :—"I hope to be in Hampshire very soon, when I trust everything will be arranged with W. (the creditor) agreeable to her wishes," and this was held a sufficient acknowledgment. And in the recent case of *Quincey* v. *Sharpe*,[5] the two following letters written by the

[1] *Smith* v. *Thorne*, 18 Q. B. 134, 143.

[2] *Phillips* v. *Phillips*, *ubi supra*.

[3] *Cornforth* v. *Smithard*, 5 H. & N. 13.

[4] 15 Beav. 415.

[5] W. N. 1876, p. 72.

defendant were held sufficient to prevent the operation of the Statute, though in fact, no account was sent in in compliance with the request in the letters. The letters were as follows :—

January 13, 1872.

"Mr. Quincey,

"Sir,—I shall be obliged to you to send in your account made up to Christmas last. I shall have much work to be done this Spring, but cannot give further orders until this be done.

"I am, Sir,

"Your humble servant,

"J. Sharpe."

February 19, 1872.

"Mr. Quincey,

"Sir,—You have not answered my note. I again beg of you to send in your account as I particularly require it in the course of this week,

"To oblige, Sir,

"Yours, &c.,

"Jno. Sharpe."

Thus, an admission of the debt will be sufficient, although the exact amount payable is disputed, or remains to be proved.[1]

[1] *Colledge* v. *Horn*, 3 Bing. 119 ; *Gardner* v. *M'Mahon*, 3 Q. B. 561 ; *Sidwell* v. *Mason*, 2 H. & N. 306 ; and see *infra*.

Qualified or conditional acknowledgment.

Secondly, it is to be considered, in case there is an admission of indebtedness sufficient to amount to an acknowledgment, whether that admission is narrowed in such a way by the contest as to exclude the presumption of a promise of payment either entirely or except in a particular manner, or upon fulfilment of some condition. In *Hart* v. *Prendergast*,[1] Parke, B., remarked as follows:—"An unconditional acknowledgment is good for that purpose (*i.e.* to prove a promise) because you would infer from it that the party meant to pay on request. But if he annexes any qualification or condition, that is not a sufficient acknowledgment without proof of the performance of it." In *Buckmaster* v. *Russell*,[2] the defendant had written as follows:—"I have received a letter from Messrs. P. and L., solicitors, requesting me to pay you an account of £40 9s. 6d. I have no wish to have anything to do with the lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled in 1851; but as you declare it was not settled, I am willing to pay you 10*l.* per annum until it is liquidated. Should the proposal meet with your approbation we can make arrangements accordingly." This was held insufficient, Willes, J., observing that it did not amount to a promise till the terms the defendant proposed were assented to.

[1] 14 M. & W. 741.

[2] 10 C. B. N. S. 749. See *Fearn* v. *Lewis*, 6 Bing. 349; *Cawley* v. *Furnell*, 12 C. B. 291, 20 L. J. C. P. 197.

However, in *Collis* v. *Stack*[1] an acknowledgment in the terms following was held good without any proof of assent. "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are for a short time longer and all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labour; this term will decide the matter." Where a defendant, called upon by a creditor, holder of two promissory notes more than six years over due, for a statement of his affairs, made out an account in which the notes were inserted as a debt to which he was liable, it was held to be a sufficient acknowledgment by the debtor.[2]

Conditional acknowledgment.

If a defendant accompanies his acknowledgment with a promise to pay upon any condition, proof of the fulfilment of the condition will be necessary. For instance, if he promises to pay when he is able, or use some similar expression, proof of the defendant's ability will be required.[3]

In a recent case the defendant had written to one of the plaintiffs as follows:—"My dear sir, the old account between us, which has been standing over so long, has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an account of how it stands."

[1] 1 H. & N. 605.

[2] *Holmes* v. *Mackrell*, 3 C. B. N. S. 789.

[3] *Tanner* v. *Smart*, 6 B. & C. 603; *Scales* v. *Jacob*, 3 Bing. 638.

It was contended for the defendant that the letter did not take the case out of the Statute, the time limited by which would otherwise have run. It was, however, held on an appeal by a majority in the Exchequer Chamber (Lord Coleridge, C.J., dissenting), that the promise in the letter was sufficient.[1] In another recent case, where there was in effect a promise to pay on alternative conditions, forbearance to sue was said to be sufficient evidence of the acceptance of one condition by the plaintiff.[2] And a promise to pay in a particular manner will not revive the debt generally.[3]

Conditional on arbitration.

When there was an agreement signed by certain persons to refer accounts between them to arbitration, and the arbitrators were empowered to ascertain by their award what was due and payable, and to order the same to be paid at such time, and in such proportion as the arbitrators should think fit, it was held on the arbitration proving abortive that the agreement only amounted to a conditional promise to pay the amount found due by arbitration, and that as the condition was unfulfilled there was no effectual acknowledgment.[4]

Qualified acknowledgment.

As an acknowledgment of a debt simply avoids

[1] *Chasemore* v. *Turner*, L. R. 10 Q. B. 500. See *Smith* v. *Thorne*, 18 Q. B. 143; 21 L. J. Q. B. 201; *Sidwell* v. *Mason*, 2 H. & N. 306, 310; 26 L. J. Ex. 407; *Collis* v. *Stack*, 1 H. & N. 605; 26 L. J. Ex. 138.

[2] *Willby* v. *Elgee*, L. R. 10 C. P. 497, 501.

[3] *Cawley* v. *Furnell*, 12 C. B. 291.

[4] *Hales* v. *Stevenson*, 9 Jur. N. S. 300.

the Statute by the implication it affords of a new promise, an acknowledgment, though otherwise sufficient if made obviously on some other account, may be held insufficient.[1] Thus in one case it was so held, where the acknowledgment consisted in the fact that a surety had written to authorize the creditor to receive a dividend upon his debt from the principal debtor.[2]

Where an acknowledgment has been given followed by an expression of "hope" that the debtor will satisfy his debt, it has often been doubted how far that expression has cut down the implied promise.[3] On this point Bramwell, B., made the following observations in *Sidwell* v. *Mason*, "It seems to me a mistake has been made in several cases with respect to the expression of hope in holding, that because along with an unconditional acknowledgment of a debt a man expresses a hope to be able to do that which he is legally obliged to do, such an acknowledgment is not sufficient."[4] Hope to pay.

In *Lee* v. *Wilmot*[5] the defendant had written to his creditor as follows:—"Your letter has reached me at last, after having been half over England. It is quite true that I have not sent you any money for years, but I really have none of my own. We just

[1] *Cripps* v. *Davis*, 12 M. & W. 159.

[2] *Cockrill* v. *Sparkes*, 1 H. & C. 699; 32 L. J. Ex. 118.

[3] *Hart* v. *Prendergast*, 14 M. & W. 741; *Rackham* v. *Marriott*, 2 H. & N. 196; 26 L. J. Ex. 315.

[4] 2 H. & N. 310.

[5] L. R. 1 Ex. 364.

manage to exist on my wife's, or at least what is left of hers. We have hard work to get on, but I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week." This letter was held by a majority of the Court of Exchequer (Martin, B., dissenting), to be a sufficient acknowledgment.

Refusal to pay.

Where an admission of a debt is accompanied with a distinct refusal to pay, the implication of a promise arising from the acknowledgment is of course rebutted.[1] Thus even under the old theory (and *à fortiori* the case would be so still more now,) an admission as follows:—"I cannot afford to pay my new debts much less my old ones," was held insufficient.[2]

Objection on merits.

Again, if an acknowledgment be accompanied with an objection to payment, which would if valid have been at any time a good defence to an action, no presumption of a promise of payment will be raised. Thus an admission of a debt made to a person, who at the same time signed a paper importing to release it, was not sufficient to avoid the Statute, although the discharge was inoperative, and was indeed conditional upon an act of the defendant which he failed to perform.[3] Similarly an

[1] *Lee* v. *Wilmot*, L. R. 1 Ex. 364; *Brigstocke* v. *Smith*, 1 C. & M. 483.

[2] *Knott* v. *Farren*, 4 D. & R. 179.

[3] *Goate* v. *Goate*, 1 H. & N. 29.

acknowledgment as follows:—"I acknowledge the receipt of the money, but the testatrix gave it me," was held inoperative.[1] But if a defendant acknowledges a debt, but insists at the same time on a set off, his acknowledgment is it seems none the less effectual.[2]

Promise not to plead Statute.

And again an admission in the following terms:—"I do not wish to avail myself of the Statute of Limitations" was held insufficient.[3] Usually, perhaps, where there is a promise not to plead the Statute, there will be found in the context something further which will amount to an acknowledgment of indebtedness whence a promise to pay may be implied; but in absence of such context it seems on the authority of the cases cited, and upon a strict application of the present theory as to the principles of the doctrine of acknowledgment, that a promise not to take advantage of the Statute will have no efficacy in itself as an acknowledgment of a debt. Such a promise, howsoever, where it is supported by a consideration, and is not a mere *nudum pactum*, may amount to an agreement, for the breach of which damages may be recovered.[4] And it must be borne in mind, that if

[1] *Owen* v. *Woolley*, Bull. N. P. 168; and see *De la Torre* v. *Barclay*, 1 Stark. 7.

[2] *Leland* v. *Murphy*, 16 Ir. Ch. R. 500.

[3] *Rackham* v. *Marriott*, 2 H. & N. 196.

[4] *East India Co.* v. *Paul*, 7 M. P. C. C. 85. In this case it is distinctly laid down by Lord Campbell that there might be an agreement that in consideration of an inquiry into the merits of a disputed claim, no advantage should be taken of the Statute of Limi-

the promise not to take advantage of the Statute be made within six years, and while the debt is still recoverable, the forbearance to sue will be itself a sufficient consideration. It may, however, be argued that any such promise must be disregarded as frustrating the policy of the Statutes, and as being contrary to the rule that prescription cannot be renounced in advance.

Promise not to plead Statute.

It might, indeed, at first sight seem that a promise not to take advantage of the Statute amounted practically to a promise to pay the debt in question. And in *Gardner* v. *M'Mahon*[1] where the promise was in the terms following:—"As you have mentioned the Limitations Act I answer at once that I am ready to put it out of my power to take advantage of the Act;" it seems (though the case may have been decided upon other grounds,) to have been so considered. It is obvious, however, that a promise not to plead the Statute in an action is not inconsistent with an intention to defend the action upon its merits. And thus we find that a promise in the following terms has not been held sufficient: "I hereby debar myself of all future plea of the Statute."[2]

Amount of debt need not be stated.

It is not necessary in order to make a binding acknowledgment that the exact sum due should be

tations in respect of time employed in the enquiry, and that an action might be brought for breach of such agreement.

[1] 3 Q. B. 561.

[2] *Waters* v. *Earl of Thanet* 2 Q. B. 757.

stated and acknowledged. An acknowledgment that some debt is due is sufficient,[1] and parol evidence may be received to prove the amount, and to prove the meaning of such words as "bill" or "balance" if used in such an acknowledgment.[2] In *Colledge* v. *Horn*[3] the defendant had written in reply to a letter of the plaintiff as follows:—"I have received yours respecting Mr. Thomas Colledge's demand; it is not a just one. I am ready to settle the account whenever Mr. T. C. thinks proper to meet me on the business. I am not in his debt 90*l.*, nor anything like that sum; shall be happy to settle the difference by his meeting me in London or at my house." And this was in accordance with the theory, above stated, held to be sufficient acknowledgment. In *Cheslyn* v. *Dalby*[4] a deed executed by A. and B. recited that A. was indebted in various sums of money, the amount of which was not yet ascertained, nor a balance struck; and that A. was willing to pay B. the amount which might appear due to B. in respect of such sums, such amount to be ascertained and paid as therein mentioned, and the deed afterwards provided for taking the accounts by the arbitration of two persons named in the deed; and it was held that, notwithstanding the clause as to arbitration,

[1] *Colledge* v. *Horn*, 3 Bing. 119; *Lechmere* v. *Fletcher*, 1 C. & M. 623. But see contra, *Spong* v. *Wright*, 9 M. & W. 629; and *Williams* v. *Griffiths*, 3 Ex. 335.

[2] *Dickinson* v. *Hatfield*, 1 Moo. & R. 141.

[3] Ibid.

[4] 4 Y. & C. 238.

the recital amounted to an absolute promise to pay the amount when ascertained; and that, when coupled with external parol evidence as to the amount, there was a sufficient acknowledgment to avoid the bar of the Statute.

Lord Tenterden's Act. Sections 1, 2, 3, 4, & 8.

It is now necessary to notice the important and well-known Act of 9 Geo. 4, c. 14, commonly referred to as Lord Tenterden's Act. This Act renders writing necessary to an effectual acknowledgment in cases under the Statute of James, and the kindred Irish Act. Notwithstanding that the Act contains a recital that various questions have arisen as to the proof and effect of acknowledgments, it has been decided that practically the Act is to be construed as altering the mode of proof only, not the legal construction of acknowledgments or promises.

The Act enacts as follows:—"1. That in actions of debt or upon the case grounded upon any simple contract no acknowledgment, or promise by words only, shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them so

as to be chargeable in respect, or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

"2. And be it further enacted, that if any defendant or defendants in any action or any simple contract shall plead any matter in abatement to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the said trial that the action could not by reason of the said recited Acts or this Act, or either of them, be maintained against the other person or persons named in such plea or any of them, the issue joined on such plea shall be found against the party pleading the same.

"3. And be it further enacted, that no indorsement or memorandum of any payment written or made after the time appointed for this Act to take effect upon any promissory note, bill of exchange, or any other writing by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of either of the said Statutes.

"4. And be it further enacted, that the said recited Acts or this Act shall be deemed and taken to apply to the case of any debt or simple contract alleged by way of set-off on the part of any defendant either by plea, notice, or otherwise.

"8. And be it further enacted, that no memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any Statute relating to the duties of stamps."

Lord Tenterden's Act only alters mode of proof.

This Act does not alter or affect the law as to what amounts to a sufficient acknowledgment; it simply renders writing necessary as a means of proof. In *Haydon* v. *Williams*,[1] Tindal, C.J., in giving the opinion of the Court of Common Pleas on the construction of this Act said as follows:—"The Statute does not intend, as it appears to us, to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of

[1] 7 Bing. 163–66. And see, *per* Pollock, C.B. in *Godwin* v. *Culley*, 4 H. & N. 373.

proof; substituting the certain evidence of a writing signed by the party chargeable for the insecure and precarious testimony to be derived from the memory of witnesses. To inquire, therefore, whether in a given case the written document amounts to an acknowledgment or promise is no other inquiry than whether the same words, if proved before the Statute to have been spoken by the defendant would have had a similar operation and effect." It appears also that the words "promise or acknowledgment" in the Act mean the same thing.[1] The terms of a lost acknowledgment in writing may be proved and the acknowledgment supported by parol evidence.[2]

Acknowledgment after action.

It results from the existing theory of acknowledgments that an acknowledgment after action brought will be of no use. Thus in *Bateman* v. *Pinder*,[3] after proceedings were commenced, a part payment was made by the defendant on account of the debt, but it was held to be inoperative to avoid the effect of the Statute.

Whether sufficiency of acknowledgment is for the jury.

The question whether a written acknowledgment is sufficient to amount to an absolute promise to pay, is a question in itself for the decision of the Court, not that of the jury.[4] Where, however, a document of doubtful construction put in evidence to avoid the

[1] *Lee* v. *Wilmot*, L. R. 1 Ex. 364–67.

[2] *Haydon* v. *Williams*, 7 Bing. 168.

[3] 3 Q. B. 574. The contrary would probably have been held when the old theory prevailed. See *Yea* v. *Fouraker*, 2 Burr. 1099.

[4] *Routledge* v. *Ramsay*, 8 A. & E. 221.

plea of the Statute has to be explained by considering extrinsic facts, then the question is one for a jury to decide.[1]

The writing must now bear the actual signature of the person to be charged. It is not sufficient if simply in his handwriting.[2] But where a whole document is in the handwriting of a person, his name at the top is a sufficient signature.[3] Although a document signed is now necessary to avoid the Statute, yet the date (if wanting) of such an acknowledgment may be supplied by parol evidence.[4]

What may be supplied by parol.

In the same way the name of the creditor to whom the debt is owing may be supplied by parol.[5] The identity also of a debt acknowledged in writing may be proved by parol. In *Shortrede* v. *Cheek*,[6] the defendant had written, "I will pay the promissory note," and it was held that the onus of proving the existence of more than one promissory note, to which the writing might refer, was upon the person disputing the debt. And a promissory note, though

[1] *Morrell* v. *Frith*, 3 M. & W. 402.

[2] *Bayley* v. *Ashton*, 12 Ad. & Ell. 493.

[3] *Holmes* v. *Mackrell*, 3 C. B. N. S. 789.

[4] *Edmonds* v. *Downes*, 2 Cr. & M. 459, 463. According to another report of the same case (4 Tyr. 179), the point was treated as doubtful. However, in *Hartley* v. *Wharton* (11 Ad. & Ell. 934), the case of *Edmonds* v. *Downes* was cited by the Court as an authority for the proposition in the text. See also *Lechmere* v. *Fletcher*, 1 C. & M. 623.

[5] *Hartley* v. *Wharton*, 11 Ad. & Ell.; 2 M. & W. 141.

[6] 1 Ad. & E. 57.

unstamped, and therefore invalid in itself, may be used as evidence to prove the identity of a debt alleged to be acknowledged.[1]

By whom the acknowledgment must be made.

Previously to Lord Tenterden's Act an admission by an agent of the debtor was equally, with that of the debtor himself, sufficient to avoid the Statute. Subsequently to the passing of that Act it was held, upon the construction of the Statute, that an admission, to be effectual, must be made personally by the person to be charged thereby.[2] Now, however, it is enacted by the Mercantile Law Amendment Act (19 & 20 Vict., c. 97, s. 13), that an acknowledgment shall be sufficient if signed by an agent duly authorised to make such acknowledgment. Thus the case-made rule which existed previously to Lord Tenterden's Act, after having been abrogated by one Statute has been restored by another. And the cases accordingly decided before Lord Tenterden's Act as to what constituted a sufficient agency for the purpose are still of use.

What is an authorised agent.

In *Burt* v. *Palmer*,[3] an agent was employed to pay money for work done, and the workmen, with his consent, were referred to him for payment. It was held, that an acknowledgment or promise to pay by him after six years was sufficient to take the case out of the Statute.

[1] *Spickernell* v. *Hotham*, Kay, 669.

[2] *Hyde* v. *Johnson*, 3 Scott, 289; *Pott* v. *Clegg*, 16 M. & W. 321. And see *Gibson* v. *Baghott*, quoted at *Whippy* v. *Hillary*, 5 Car. & P. 209.

[3] 5 Esp. 145.

And in *Williams* v. *Innes*,[1] Lord Ellenborough lays down the general rule, that if a man refers another upon any particular business to a third person, he is bound by what this third says or does concerning it as much as if that had been said or done by himself.

And an admission by a wife who was accustomed to conduct the business of her husband was held sufficient to take the case out of the Statute in an action against the husband.[2]

And where goods were supplied to a wife usually living apart from her husband, for her own use, she was considered to be her husband's agent for the purpose of making an acknowledgment.[3]

A married woman cannot effectually acknowledge a debt contracted *dum sola*.[4]

To third person.

Previously to the passing of Lord Tenterden's Act, and while the "presumption" theory of acknowledgment still prevailed, it was unnecessary for an acknowledgment, to be effectual, that it should be made to the creditor himself or to his agent.[5] The passing of Lord Tenterden's Act, on a proper construction of the Act, does not affect the question. "There is no doubt," says Pollock, C.B., in *Godwin*

[1] 1 Camp. 364.

[2] *Anderson* v. *Sanderson*, Holt, N. P. 591.

[3] *Gregory* v. *Parker*, 1 Camp. 394.

[4] *Pittam* v. *Foster*, 1 Barn. & Cr. 248.

[5] *Peters* v. *Brown*, 4 Esp. 46; *Clark* v. *Hougham*, 2 B. & C. 149; *Mountstephen* v. *Brooke*, 3 B. & Ald. 141; *Halliday* v. *Ward*, 3 Camp. 32.

v. *Culley*,[1] "as to the proper construction of 9 Geo. 4, c. 14, viz., that what would formerly have taken a case out of the Statute of Limitations, if the acknowledgment had been by word of mouth, is now sufficient if the acknowledgment is in writing." The Act then does not affect the rule on this point. The change, however, in the theory of acknowledgment, dating from the case of *Tanner* v. *Smart*, before referred to, and by virtue of which something equivalent to a new promise to pay is required, may affect the question.

To third person.

The question then now is, whether a promise to a creditor to pay him can be implied from an acknowledgment made to another person. And it may be mentioned that, previously to *Tanner* v. *Smart*, it has been pointedly so laid down more than once by the Court; although, inasmuch as under the then prevailing theory a new promise was not necessary, these opinions may be of the nature of *obiter dicta*, and not necessary to the decision in each case. Thus, in *Mountstephen* v. *Brooke*, where, in a deed made between the defendants and a third person, admission was made by the defendants of a debt due to the plaintiffs, who were wholly strangers to the deed, it was held sufficient to avoid the operation of the Statute; and Abbott, C.J., said that the legal effect of an acknowledgment (even though made to a stranger) was itself to raise a promise to pay.[2]

[1] 4 H. & N. 373. And see, *per* Tindal, C.J., in *Haydon* v. *Williams*, 7 Bing. 166.

[2] 3 B. & Ald. 141.

To third person.

Again, in *Halliday* v. *Ward*,[1] where the defendant, a Quaker, wrote to his father, who was a co-obligor with him on a promissory note, as follows:—"With regard to Halliday's money, thou must settle it thyself," Lord Ellenborough said that the letter acknowledged the existence of the debt, and that the promise to pay (although the debt was not acknowledged to the plaintiff) was raised by law. So, in *Clark* v. *Hougham*, an admission to one of the several parties was held to enure for the benefit of all for the purpose of the Statute of Limitations; and though it was suggested that the admission was made to one as the agent of the others, it was expressly stated by Bayley, J., that agency was not necessary to be proved. So far it might seem that as well under the new theory of acknowledgment as under the old, an admission to a third person would be sufficient; as it might be gathered from the judicial remarks above quoted, that a promise to pay a creditor may be implied from an admission not made to him personally. There are, however, a large number of more recent judicial decisions, or rather, perhaps, of judicial remarks, on the other side.

Thus in *Godwin* v. *Culley*[2] Martin, B., distinctly laid down that an admission to a third person is not sufficient for the purpose, and Bramwell, B., expressed a similar opinion. And again in *Grenfell*

[1] 3 Camp. 32.

[2] 4 H. & N. 373.

v. *Girdlestone*,[1] Alderson, B., expressly raises and decides the point:—"If a man were to write a letter," he suggests, "to a third person acknowledging the debt it would not take it out of the Statute." Both in *Godwin* v. *Culley*, however, and in *Grenfell* v. *Girdlestone*, the judicial remarks on this point were rather in the nature of *obiter dicta* than necessary for the decision of the case. In this conflict of authority, and until a direct decision on the point, this important question cannot be considered otherwise than open.

[1] 2 Y. & C. 662–676.

CHAPTER VI.

SIMPLE CONTRACTS—ACKNOWLEDGMENT BY PART PAYMENT.

Part payment.

In many of the Statutes it is expressly directed that a part payment of the principal or interest of a sum due shall operate to prevent the bar of the Statute. In such cases of course if the part payment falls within the wording of the Statute it is sufficient. Otherwise, where not made an acknowledgment by Statute, a part payment of principal or interest only amounts to evidence from which an inference of acknowledgment of indebtedness may be derived, and is not absolutely such an acknowledgment.[1]

As has been already seen the Act of James 1st respecting actions on simple contract debts contained in terms no saving in cases of acknowledgment by the debtor; but such a saving where there had been a verbal or written acknowledgment of the debt was, as we have seen, held to be implied by the judges. A similar exception was read into the Acts in cases of part payment of principal or interest. And this

[1] *Hollis* v. *Palmer*, 2 Bing. N. C. 713; *Ridd* v. *Moggridge*, 2 H. & N. 567.

exception is specially preserved in Lord Tenterden's Act (9 Geo. 4, c. 14), which provides that nothing therein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever.

Principle and requisites of an acknowledgment by part payment.

The principle upon which a part payment of principal or interest by a debtor will prevent his availing himself of the bar of the Statute is that such a payment amounts to an acknowledgment of the debt, and from an absolute acknowledgment, as we have seen, the law implies a new promise founded on an old consideration to pay.[1] In *Tippets* v. *Heane*[2] the requisites of an acknowledgment by part payment are laid down as follows :—" In order to take a case out of the Statute of Limitations by a part payment it must appear in the first place that the payment was made on account of a debt ; secondly, that the payment was made on account of the debt for which the action was brought, and in the third place it is necessary to show that the payment was made as a part payment of a greater debt, because the principle upon which a part payment takes a case out of the Statute is that it admits a greater debt to be due at at the time of part payment."

Does payment of principal revive claim to interest, and *vice versâ*.

Questions have been raised how far a payment of principal implies a promise to pay interest and *vice versâ*. On this point it may be noticed that, as a

[1] *Bealy* v. *Greenslade*, 2 Cr. & Jer. 61 ; *Purdon* v. *Purdon*, 10 M. & W. 562.

[2] 1 Cr. M. & R. 252.

rule, a debt is composed of principal and interest, and payment of interest is consequently a part payment of the whole debt,[1] and this reasoning would seem to be equally applicable to the converse case. And in *Purdon* v. *Purdon*[2] Parke, B., observes that payment of interest it is true does not necessarily prove that the principal money is due, but it is evidence of it. The question whether particular debts do or not bear interest is wholly beyond the scope of the present inquiry.[3]

Rebuttal of implication.

The implication of a promise derived from part payment of principal or interest is however of course liable to be rebutted, and a part payment will not take the case out of the Statute, unless made under circumstances which do not negative the implied promise to pay the residue. Thus where a person, on being applied to for interest, paid a sovereign, and said he owed the money but would not pay it, it was held not to amount to an acknowledgment, subject to the question for the jury to decide whether the debtor seriously intended to refuse payment or spoke only in jest.[4] So where a party revives a debt barred by the Statute by paying it into Court, and at the same time refuses to pay interest upon it, the

[1] *Bealy* v. *Greenslade*, 2 Cr. & Jer. 61.

[2] *Ubi supra.*

[3] See on this point *Hill* v. *South Staffordshire Railway Co.*, L. R. 18 Eq. 154.

[4] *Wainman* v. *Kynman*, 1 Ex. 118. See also *Fosler* v. *Dawber*, 6 Ex. 839; and *Davies* v. *Edwards*, 7 Ex. 22.

payment of the principal does not revive the claim for interest.[1]

Where a debtor *at the time* of making a payment to his creditor expressly states that it is not on account of the debt in question, it is not a part payment of such debt. But the statement must be made at the time, otherwise any declarations on the subject by the debtor are only evidence of more or less value as to the intention with which the payment was at the time made. Thus in *Baildon* v. *Walton*,[2] where a defendant in a chancery suit had admitted payment by him of certain half-yearly payments down to a period within six years, but alleged in it that they were paid not as interest on a debt due by him to the plaintiff's testatrix, but by way of annuity and in pursuance of an arrangement made when a sum of money was given to the defendant, it was held, that the jury were at liberty to reject the latter part of the statement, and that it might be taken simply as an acknowledgment of payment of money, and the fact that it was interest on the debt might be proved by other evidence. Rebuttal of implication.

It must be borne in mind, however, that where the debt is not for a definite amount, but the sum is indeterminate, it may be when a payment has been made that it has been made not as a part payment but as a discharge of the whole in the intention of the payer, in which case of course no promise to pay Rebuttal of implication. Indeterminate debt.

[1] *Collyer* v. *Willcock*, 4 Bing. 313.

[2] 1 Ex. 617.

Payment into Court.

the residue can be implied.[1] In the same way payment into Court will not usually revive the right to the residue (if any) of the debt, inasmuch as such payments are commonly made as payments of all that is admitted by the debtor to be due.[2] And now, as we have seen, such a payment after action commenced would probably be considered too late.

Identity of debt.

There must, of course, be reasonable evidence of the identity of the debt sued for with that on account of which the part payment has been made.[3] Where under an agreement there are separate causes of action to recover two sums secured by the same bond, payment on account of one of such sums will not revive the debt as to the other sum.[4] Where a payment appears to have been made on account of an existing debt, the jury are warranted in considering it as applied to the payment of the particular debt sued for, unless there be evidence of any other existing debt.[5]

The question is one for the jury.

The question whether a payment made by a debtor, who afterwards seeks to take advantage of the Statute, was made on account and in part payment of the particular debt is one for a jury, subject of course to the direction of the Court. In *Burn* v.

[1] *Burn* v. *Boulton*, 2 C. B. 476; *Waugh* v. *Cope*, 6 M. & W. 824.

[2] *Long* v. *Greville*, 3 B. & C. 10; *Reid* v. *Dickons*, 5 B. & Ad. 499.

[3] *Waters* v. *Tomkins*, 2 C. M. & R. 723, 726.

[4] *Ashlin* v. *Lee*, W. N. 1875, p. 42.

[5] *Evans* v. *Davies*, 4 Ad. & Ell. 840.

Boulton, where there were two clear debts due by the debtor, a payment by him within six years, not specifically appropriated as payment to either, was held to have no effect in reviving either, so as to remove the bar created by the Statute.[1] But the rule deducible from *Burn* v. *Boulton* must not be accepted too broadly. In *Walker* v. *Butler*[2] the case of *Burn* v. *Boulton* was considered; and it was observed by Earle and Crompton, JJ., that where there are two debts due to a creditor, and a payment is made him by the debtor without special appropriation to either, much must depend on the special circumstances of the case; that the case of *Burn* v. *Boulton* would be applicable only where the two debts were entirely distinct, and that it was properly a question for the jury whether a payment so made was made generally on account of whatever might at the time be due from the debtor to his creditor, in which case both debts would be exempted from the operation of the Statute.

Appropriation of part payments.

The general rules by which, according to English law, a payment is appropriated when there are several debts due by the payer to the payee are well known. Firstly, the payer can appropriate the payment himself by an expression at the time of his intention that the payment is to be applied in discharge of a particular debt, in accordance with the maxim, *quicquid solvitur solvitur secundum ani-*

[1] *Burn* v. *Boulton*, 2 C. B. 485.

[2] 6 E. & B. 506.

mum solventis. Secondly, if the payer fails to appropriate himself the creditor may do so, in accordance with the maxim, *quicquid recipitur recipitur in modum recipientis.* Thirdly, if both fail, the law appropriates the payment to the earliest debt. It seems, with regard to debts barred by the Statutes of Limitation, that a creditor may appropriate a part payment towards satisfaction of a debt, the right to recover which is already lost, but not so as to raise a promise to pay the residue, so as to remove it from the operation of the Statute. Thus, in *Mills* v. *Fowkes*,[1] it has been decided that where a debtor owes his creditor some debts from a period longer than six years, and others from a period within six years, and pays a sum without appropriating it to any particular debt, though such payment is not a payment on account of the old debts, so as to take them out of the Statute, yet the creditor may at any time apply such payment to the debts due longer than six years.

Appropriation.

When there are several debts, some barred and others not barred, the effect of a payment of principal generally will be to take any debt not then barred out of the Statute, but it will not revive a debt which is then barred; and the inference will be that the payment is to be attributed to those not barred.[2] Where there were three notes executed,

[1] 5 Bing. N. C. 455. See *Bevan* v. *Gething*, 3 Q. B. 740.

Nash v. *Hodgson*, 6 D. G. M. & G. 474.

[2] *Per* Cranworth, C., in

two of which were barred, and one was not, and a payment was made of a small sum on account generally, it was held the payment did not revive the remedy on the two older debts, but did prevent time from continuing to run in the case of the latter. [1]

Where there are two distinct debts it seems that an unappropriated payment may revive neither.[2]

Oral proof of part payment.

It was originally held that the evidence of part payment to avoid the Statutes must be in writing, signed, it being considered that to allow a debt to be revived on any less strict evidence of a part payment was within the mischief of the Act.[3] But the doctrine established in *Willis* v. *Newham*, after being frequently questioned,[4] was eventually overruled in the case of *Cleave* v. *Jones*.[5] And now a part payment for the purposes of the Statute may be proved orally or otherwise, as any other fact.

Part payment need not be in money.

It is not necessary, for the purposes of the Statute, that a part payment of principal or interest should

[1] *Nash* v. *Hodgson*, 1 Kay, 650; on appeal, 6 D. G. M. & G. 474.

[2] *Burn* v. *Boulton*, 2 C. B. 476. *Supra*, p 69.

[3] *Willis* v. *Newham*, 3 Y. & J. 518; *Trentham* v. *Deverill*, 3 Bing. N. C. 397; *Bayley* v. *Ashton*, 12 A. & E. 493; *Maghee* v. *O'Neill*, 7 M. & W. 631; *Eastwood* v. *Saville*, 9 M. & W. 615.

[4] See *per* Lord Denman in *Trentham* v. *Deverill*:—"If I were now called on to put a construction upon the Act, I should be of opinion that any proof of payment was sufficient;" and a similar remark of Lord Abinger in *Maghee* v. *O'Neill*.

[5] 6 Ex. 573. See *Edwards* v. *Janes*, 1 Kay & J. 534.

be made in actual money. Thus, a payment in goods may be a sufficient part payment, and if parties to a bill of exchange agree that goods shall be supplied and taken accordingly, that amounts to a part payment.[1] And generally it may be said that where a thing is received upon agreement in reduction of a debt, that is a payment sufficient to take the debt out of the Statute.[2] In *Bodger* v. *Arch*[3] it was agreed between plaintiff and defendant that the defendant, instead of paying interest due by him, should afford maintenance to the plaintiff's child, and it was held that the maintenance of the child amounted to a part payment.

Nor is it necessary that either money or goods should actually pass, for payment may be made by settlement of account. "If two persons meet, and one says to the other, I owe you so much, and you owe me so much, but instead of an exchange of money they agree to settle the account by setting off one against the other, and that is done, that is a payment by settlement of account."[4]

Test of part payment.

In *Maber* v. *Maber*,[5] after a debt due to the plaintiff by his son had been barred by the Statute, the plaintiff, his son, and his son's wife had an interview, at which the interest due to the plaintiff

[1] *Hart* v. *Nash*, 2 Cr. M. & R. 337

[2] *Hooper* v. *Stevens*, 4 A. & E. 71.

[3] 10 Ex. 333.

[4] *Per* Pollock, C. B., in *Amos* v. *Smith*, 31 L. J. Ex. 423; 1 H. & C. 238.

[5] L. R. 2 Ex. 153.

was calculated. The plaintiff's son then put his hand into his pocket, as if to get out the money to pay it. The plaintiff stopped him, and, writing a receipt for the money, gave it to his son's wife, saying he would make a present of it to her. It was held, by a majority of the Court of Exchequer, Bramwell, B., dissenting, that the transaction was sufficient to take the case out of the Statute of Limitations. The true test as to what transactions will amount to a part payment for the purposes of avoiding the Statute of Limitations appears from the judgment in *Maber* v. *Maber*, as well as from other cases.[1] Thus it may broadly be laid down that any facts which would prove a plea of payment of interest or principal in an action brought to recover either would amount to a payment sufficient to bar the Statute. And Bramwell, B., in dissenting from the opinion of the majority in *Maber* v. *Maber*, did so on the ground that in his judgment the facts would not have supported such a plea of payment.

Further, if by agreement money is paid by a debtor on behalf of his creditor to a third person, that may be a sufficient part payment as between the debtor and creditor.[2]

Part payment by bill.

Where a debtor has given a bill on account of his debt, some difficulty has arisen as to the effect of it as a part payment, especially if it turn out ultimately

[1] *Bodger* v. *Arch*, 10 Ex. 333; *Amos* v. *Smith*, 1 H. & C. 238.

[2] *Worthington* v. *Grimsditch*, 7 Q. B. 479.

worthless. On this point it may be observed that payment is taken in the popular use of the term to include a giving and taking of a negotiable instrument on account of a debt, as well as a giving and taking it in satisfaction of a debt.[1] A bill is conditional payment, and its immediate operation as an acknowledgment of a balance demand is not to be affected by its operation as a payment being liable to be defeated at a future time; and even if it is worthless, the intention and the act by which it is evinced remain the same.[2]

A question arises, when a bill is given in part payment of a debt, whether the part payment must be considered made at the time of the delivery of the bill, or of payment thereof. On this point it has been decided that when a debtor draws a bill of exchange to be applied in part payment of a debt, and the bill is paid when due by the drawee to the creditor, it operates as a part payment from the time of the delivery of the bill by the debtor, not from the time of the payment.[3]

Indorsements of payments on bills.

Indorsements by a creditor on a bill or note admitting payments of interest or principal, if made before the debt was barred, were formerly after the creditor's death evidence for the purpose of avoiding the plea of the Statute; the principle of their admission as evidence being that they were acknowledg-

[1] *Turney* v. *Dodwell*, 3 Ell. & Bl. 136.

[2] *Per* Campbell, C.J., Ibid.

[3] *Irving* v. *Veitch*, 3 M. & W. 90; *Gowan* v. *Forster*, 3 B. & A. 507.

ments made against the interest of their maker.[1] It was otherwise if the indorsements were made after the debt was already barred as the principle did not then apply.

And now it is enacted by section 3 of Lord Tenterden's Act that "no indorsement or memorandum of any payment written or made after the time appointed for this Act to take effect upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made shall be deemed sufficient proof of such payment so as to take the case out of the operation of either of the said Statutes."

It is remarked in *Bradley* v. *James*,[3] by Maule, C.J., that this section only applies to the case where there is nothing more than an indorsement or memorandum on the note or bill or other writing which constitutes the contract declared on. And it appears from the same case that the *memoranda* made against their own interest of dead persons in ledgers, account books, and otherwise, may still be used as evidence for the present purpose.

By agent.

Part payment by an agent of the debtor is as effectual in regard to the Statute Law of Limitations as by the principal; but the agency must be proved

[1] *Per* Lord Ellenborough, in *Higham* v. *Ridgway*, 10 East, 109.

[2] *Briggs* v. *Wilson*, 17 Beav. 330; *S. C.* on appeal, 5 D. G. M. & G. 12; *Gleadow* v. *Atkin*, 1 Cr. & M. 421; *Searle* v. *Barrington*, 8 Mod. 278.

[3] 13 C. B. 822.

to the satisfaction of the jury.[1] In *Rew* v. *Pettet*,[2] the defendants, who were the churchwardens and an overseer of a parish, gave some promissory notes as security to the plaintiff, expressly signing the notes as officers of the parish. Other parish officials from time to time duly paid interest upon the notes; and this payment was held to be sufficient to prevent the defendants from setting up the bar of the Statute.

But a payment by a married woman not authorised by her husband, on account of a note made by them previously to marriage, was not an acknowledgment sufficient to keep alive the debt against either.[3]

To agent.

Similarly it appears not necessary that a part payment to be effectual to avoid the Statute should be made to the creditor personally, but that payment to his agent will suffice.[4]

Part payment.

Where a bill was filed by a simple contract creditor of a testator against his executors and devisee of realty to make the real estate liable under the Act of 47 Geo. 3, which rendered traders' real estate liable for simple contract debts, it was held that notwithstanding a part payment by the executrix within six years, the debt being more than six years old, was barred as against the real estate.[5] The reason

[1] *Jones* v. *Hughes*, 5 Ex. 104.

[2] 1 Ad. & Ell. 196. See also *Jones* v. *Hughes*, 5 Ex. 104.

[3] *Neve* v. *Hollands*, 17 Q. B. 262.

[4] *Evans* v. *Davies*, 4 Ad. & Ell. 840; *Edwards* v. *Janes*, 1 K. & J. 534.

[5] *Putnam* v. *Bates*, 3 Russ. 188.

of this decision is given by the V.-C. Kindersley in *Coope* v. *Cresswell*.[1] It is that (as elsewhere remarked) such a payment is not regarded in respect of the Act of James the First as simply an acknowledgment of a debt but as a new promise to pay; and in this view a promise by an executor could not bind a devisee.

Part payment.

In *Brocklehurst* v. *Jessop*[2] it was laid down that if an equitable mortgagee enters into possession of an estate and receives the rent of it such receipt ought *primâ facie* to be taken as a part payment of either the principal or interest of his debt so as to prevent time from running against his claim. But in *Fordham* v. *Wallis*,[3] this case was much criticised, and it was remarked that in fact the judgment amounted only to a *dictum* as the practical result of the case was only the making of certain inquiries.

Part payment in general.

It has been remarked that there may be a difference between acknowledgments by part payment of principal or interest and other acknowledgments in respect of the extent to which they may be binding on persons, other than those actually making acknowledgment, inasmuch as part payment is a benefit to all persons liable to the debt as it relieves them from so much of their liability.[4]

[1] L. R. 2 Eq. 119. See *Fordham* v. *Wallis*, 10 Ha. 217; *Briggs* v. *Wilson*, 5 D. M. & G. 12.

[2] 7 Sim. 438.

[3] 10 Ha. 217.

[4] *Per* Chelmsford, C., in *Coope* v. *Cresswell*, L. R. 2 Ch. 124.

CHAPTER VII.

ACKNOWLEDGMENTS BY CO-CONTRACTORS.

Admission by co-contractors.

ORIGINALLY it was held that admissions by a co-contractor or co-partner were binding on his fellow. The leading case on the old law was *Whitcombe* v. *Whitcombe*,[1] but the doctrine thereby established was found productive of hardship, and it has been gradually abolished by Statute. Firstly by Lord Tenterden's Act (9 Geo. 4, c. 14), which enacts as follows:—"That where there shall be two or more joint contractors or executors or administrators of any contractors, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them. Provided always, that nothing therein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided always, that in actions to be commenced against two or more such joint contractors or executors or administrators, if it shall appear at the trial or otherwise, that the plain-

[1] Doug. 652. And Smith's L. C. vol. 1, p. 575.

tiff, though barred by either of the said recited Acts or this Act as to one or more of such joint contractors, shall, nevertheless, be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise or otherwise, judgment may be given, and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

"And be it further enacted, that if any defendant or defendants in any action or simple contract shall plead any matter in abatement to the effect that any person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not by reason of the said recited Acts or this Act or either of them be maintained against the other person or persons named in such plea or any of them, the issue joined on such plea shall be found against the party pleading the same."

And now it has been enacted by section 14 of the Mercantile Law Amendment Act (19 & 20 Vict., c. 98), that in reference to the Statutes 21 James 1., c. 16, s. 3, the 3 & 4 Wm. 4, c. 42, s. 3, and the Irish Act, 16 & 17 Vict., c. 113, s. 20, that when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator shall lose the benefit of the said

enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

In *Cockrill* v. *Sparkes*[1] a surety had authorised the creditor of his principal by letter to receive a dividend under an assignment for the benefit of creditors, made by the principal without prejudice to his claim against the surety. And it was held that the letter and the payment together did not amount to more than payment "only" within the last section.

It seems that a part payment made by one co-contractor will not, under this section, revive a debt against his fellow contractor, even though the latter has consented to the payment.[2]

Where there has been a dissolution of partnership a payment made by a continuing partner will not revive a debt to the detriment of the retiring partner, although accounts have not been finally adjusted between the partners and payments have continued to be made between them.[3]

[1] 1 H. & C. 699.

[2] *Jackson* v. *Woolley*, 8 Ell. & B. 778.

[3] *Watson* v. *Woodman*, W. N. 1875, p. 180.

CHAPTER VIII.

SIMPLE CONTRACTS—DISABILITIES.

Exceptions to general laws.

THE general rules existing by Statute or otherwise which limit the time within which claims must be prosecuted are subject to numerous exceptions in case of disability of parties. Such exceptions exist where, from some impediment on one side or the other the plaintiff has been disabled from prosecuting his claim. The policy of the law is not to discourage such exceptions, especially where the moral justice of the case is in favour of the plaintiff. Thus in a recent case, Sir G. Jessel, M.R., has observed that where a debt is clearly admitted and where the Statute is used not with a view of protecting persons from a claim of which they doubt the truth and honesty, but for a purpose for which it was not intended, namely to defeat an honest claim which is not brought forward within six years, the Court is anxious to listen to any fair ground which may bring the case of the creditor within some or one of the exceptions which have been established to the stringent provisions of the Act.[1]

Policy of law does not discourage such exceptions.

The Statute of James 1, c. 16, contains in the

Saving in case

[1] *Boatwright* v. *Boatwright*, L. R. 17 Eq. 74.

of disability of plaintiff.

seventh section a saving in case of the disability of the plaintiff by reason of infancy, coverture, weakness of mind, imprisonment, or absence beyond seas. The section is as follows :—" Provided nevertheless and be it further enacted, That if any person or persons that is or shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of account, actions of debt, actions of trespass, for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, *feme coverte*, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done." It will be noticed that it applies in terms to actions of accounts, or actions of debt only. But it has been held and it is now the law that actions on assumpsit and for unliquidated damages, though not within the words, are within the equity of the proviso.[1] In *Piggott* v. *Rush*,[2] indeed, this view, though followed, was expressly disapproved by the Court, which consisted of Denman,

[1] *Swayne* v. *Stephens*, Cro. Car. 245; *Crosier* v. *Tomlinson*, 2 Mod. 71 (Ellis, J., *dubitante*); *Piggott* v. *Rush*, 4 Ad. & Ell. 912.

[2] *Ubi supra.*

C.J., and Littledale, Patteson, and Coleridge, JJ. They declined, indeed, to overrule the previous cases, but expressed an opinion that were the question *res integra* their construction of the Statute would have been different. Though a plaintiff, if under one of the disabilities mentioned in the Act, has six years from the cessation of his disability within which he may take proceedings, yet he is not thereby precluded from taking proceedings earlier if he is able so to do, even if the original term of six years has expired since the cause of action.[1]

Plaintiff may sue during disability.

It was held also that a plaintiff under the disability of absence beyond seas might sue before his return to England.[2] And the provision was held applicable to foreigners who had never been in and could not therefore strictly return to England.[3]

The saving in case of the disability of the plaintiff, by reason of absence beyond seas or imprisonment, is now abolished by the Mercantile Law Amendment Act,[4] and with regard to the disability[5] of defendants to be sued it is enacted, that no part of the United Kingdoms of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to them being

[1] *Forbes* v. *Smith*, 11 Ex. 161; *Townsend* v. *Deacon*, 3 Ex. 706.

[2] *Le Veux* v. *Berkeley*, 5 Q. B. 836; *Strithorst* v. *Graeme*, 2 W. Bl. 723.

[3] *Lafond* v. *Ruddock*, 13 C. B. 813.

[4] 19 & 20 Vict., c. 97, s. 10.

[5] Ibid., s. 12.

part of the dominions of Her Majesty, shall be deemed to be beyond seas within the meaning of the Statute of Anne hereinafter to be referred to. Where the causes of action accrued within the jurisdiction of the Supreme Court of Calcutta, while both parties resided there and one of the parties afterwards returned to England, he was allowed the full period of six years from his return within which he might bring his action.[1]

No difference between voluntary and involuntary disabilities.

There is no distinction for the purposes of the Statute Law of Limitations between voluntary and involuntary disabilities.[2] In *Doe* v. *Jones,* Lord Kenyon notices that it would be mischievous to refine and make nice distinctions in such cases. However, in an old case of *Jenner* v. *Tracey,*[3] there is an *obiter dictum* to the contrary, and a distinction is drawn there by Lord King between a necessary absence beyond seas and an avoidance or retarding of justice by abscondance.

Co-existing and successive disabilities.

Where several disabilities co-exist in the same person time does not commence to run against him till all have ceased.[4]

There is a curious absence of authority as to the effect of successive disabilities supervening and overlapping each other in cases of simple contracts.

[1] *Williams* v. *Jones,* 13 East, 439.

[2] *Doe* d. *Duroure* v. *Jones,* 4 T. R. 310; *Lessee of Supple* v. *Raymond,* Hayes, 6.

[3] Quoted at *Cook* v. *Arnham,* 3 P. W. 287 (*n*).

[4] *Sturt* v. *Mellish,* 2 Atk. 610.

Possibly it has often been taken for granted that time will not commence to run till the expiration of the last; and it would probably be now so held, at all events when they occurred in the same person. It has, indeed, been stated that the period cannot be extended by the connection of one disability with another in these cases;[1] but the words of the judges to a contrary effect in the recent case of *Borrows* v. *Ellison*,[2] though decided upon the Statute 3 & 4 Wm. 4, c. 27, would seem to apply by analogy to cases of simple contract.

Neither in the Act of 21 James 1, c. 16 (which deals with simple contract debts), nor in that of 3 & 4 Wm. 4, c. 27 (regulating the title to land), is there any saving in favour of the plaintiff by reason of the disability of the defendants. It is rather difficult to see why a plaintiff, inasmuch as in the case of disability on his own part he is so carefully considered and protected, should not have been further protected in the case of a disability on the part of the defendant to be a proper party to any action or suit. Some reasons, however, for such a distinction were suggested in *Jones* v. *Tuberville*,[3] by Lord Commissioner Ashhurst, and in *Towns* v. *Mead*[4]

[1] Angell on Lim., p. 206, where an American case (*Butler* v. *Howe*, 1 Shep. (Me.) p. 397) is referred to, where an infant had, before the cessation of infancy, come under the disability of coverture, and yet time ran from the cessation of infancy.

[2] L. R. 6 Ex. 128.

[3] 2 Ves. 14.

[4] 16 C. B. 123–35. And

it is remarked by Maule, J., that a plaintiff (in case of the absence of defendant beyond seas) was not entirely without a remedy, inasmuch as he might issue his writ, and continue it by *alias* or *pluries*, and so on until the defendant returned, or he might proceed to outlawry against him.

Absence beyond seas.

By the Statute, however, of 4 Anne, c. 16, s. 19, this defect, if it were one, was remedied so far as concerned the single disability of absence beyond seas in regard to the numerous cases (which do not include claims on specialty or to realty), enumerated in that Act.[1] And by the Act of 3 & 4 Wm. 4, c. 42, s. 4, a similar saving is enacted with regard to specialty debts in case of the absence beyond seas of a defendant.[2] And it does not appear that the exception in either of these cases is abolished by the 19 & 20 Vict., c. 97, s. 10[3] (The Mercantile Law Amendment Act), which abolishes the exceptions existing in case of disability arising from absence beyond seas on the part of plaintiffs.

Though, where a defendant in these cases is abroad, the Statute does not begin to run in his favour till six years after his return, yet it is not necessary for the plaintiff to wait till his return, and he may take such proceedings as he is able at any

see *Fannin* v. *Anderson*, 7 Q. B. 811; *Williams* v. *Jones*, 13 East, 439; *Story* v. *Fry*, 1 You. & C. C. C. 603; and *Fladong* v. *Winter*, 19 Ves. 196.

[1] See Appendix.

[2] See Appendix.

[3] See Appendix.

time, though six years have elapsed from the original cause of action.[1]

A return must be more or less of a permanent nature, and mere entry within British jurisdiction for a temporary purpose, for instance, by touching in a vessel at Deal, may not be a return within the Act.[2]

[1] *Forbes* v. *Smith*, 11 Ex. 161.

[2] *Gregory* v. *Hurrill*, 1 Bing. 324; *Koch* v. *Shepperd*, 18 C. B. 191.

CHAPTER IX.

REAL PROPERTY.

The case of real property is chiefly governed by 3 & 4 Wm. 4, c. 27.

In regard to real property it may be well to first consider the Statute Law of Limitation in the simplest form of cases; that is, where the owner is wrongfully out of provision, and the person occupying is a simple trespasser. Cases where there is some special relation to complicate the subject, as, for instance, the case of landlord and tenant, mortgagor and mortgagee, trustee and *cestui que trust*, will be considered later on. Real property is now almost entirely governed as to the present subject by the well-known Statute, 3 & 4 Wm. 4, c. 47,[1] and discussion on the question in its simple forms is little else than a commentary on the wording and

[1] This Act has been in effect re-enacted with alterations by the 37 & 38 Vict., c. 57. See Appendix, *infra*. The effect of that Act (which does not, however, come into operation till the year 1879), will be to diminish the length of the periods under which a title may be gained under Statute, and consequently greatly to increase the importance of the subject as to realty. Fortunately the new Act is almost identical with the old, except as to length of periods, so that the cases decided upon the old Act will be applicable to the new, and the vast amount of past litigation on the subject will not have been wasted for the future.

meaning of that Act. There are, however, some cases which have been intentionally or otherwise omitted from the Statute. These we will first consider.

Scope of the Act.

The scope of the Act is defined by the first section, which is an interpretation clause,[1] and the wording of which requires a careful perusal. Broadly stated, the object of the section is to substitute the general terms *land* and *rent* for a more particular enumeration of the various kinds of real property in each of the subsequent sections. Thus, by this section the term "land," as used afterwards is interpreted to mean, speaking generally, all corporeal hereditaments; while the term "rent" is similarly to include all hereditaments of an incorporeal nature. This section must be construed with accuracy. Thus, in a case on the 42nd section of the Act, which limits the amount of arrears of interest recoverable on mortgages of "land" alone, the term "rent" being probably accidentally omitted, it was decided that a mortgage of turnpike tolls was not within the provisions of the section.[2]

Ambiguity of the word "rent."

There is an ambiguity in the term "rent" which may mean either the estate of inheritance in a rent or the conventional rent receivable under a lease. Indeed, the term "rent" is used pretty indiscriminately in both senses throughout the Act. In the second section an estate of inheritance such for which an assize might formerly have been had is alone in-

[1] See Appendix.

[2] *Mellish* v. *Brooks*, 3 Beav. 22.

cluded, but in the 42nd section, dealing with arrears, both kinds of rent are included;[1] while in one section—the ninth—the word is used in all seven times, three times in the first and four times in the second sense. This difficulty will be referred to later on, in discussing the relations of landlord and tenant.[2]

The Statute was extended to embrace the inheritance in tithes, in accordance with the recommendation of the Real Property Commissioners, who were of opinion that the principles upon which long enjoyment is held to be conclusive evidence of title applied to this species of property as fully as to any other.[3]

Ambiguity of the word "tithes."

There is an ambiguity as to the word "tithes" similar to that above noticed in regard to rent, and in this case it may now be considered as decided that the Act applies to an estate of inheritance in tithes solely. An opinion to the contrary of Lord Langdale, in *The Dean and Chapter of Ely* v. *Bliss*,[4] having been apparently overruled by the later decision of Lord St. Leonards.[5] Between the occupier,

[1] *Grant* v. *Ellis*, 9 M. & W. 113; *De Beauvoir* v. *Owen*, 5 Exch. 179; *Archbold* v. *Scully*, 9 H. L. C. 360.

[2] See Index. Landlord and Tenant.

[3] 3rd Rep. of Real Property Commissioners, p. 59.

[4] 5 Beav. 574.

[5] *Dean of Ely* v. *Bliss*, 2 D. G. M. & G. 459–68. And see, *per* Alderson, B., in *Dean of Ely* v. *Cash*, 15 Mees. & W. 617, "The word 'tithes' is like rent, ambiguous. It may mean either the estate in the tithes, or it may mean the chattel itself, the fruits of the estate."

therefore, of the land and the owner of the tithe the Statute now in discussion does not apply, and questions arising between them as to the limitations of the right to recover any tithes or modus are left to the provisions of the Act 2 & 3 Wm. 4, c. 100, which remain unaffected by the later Statute. It is to be observed also that, even as an inheritance, tithes are not affected by this Statute if belonging to a spiritual corporation sole.

3 & 4 Wm. 4, c. 27 applies only to tithes of inheritance,

and not to those when belonging to a spiritual corporation sole.

Heriots.

It was doubtful how far the Act applied to heriots and to rents (if such exist) payable at intervals of more than a year. On this question in *Owen* v. *De Beauvoir*,[1] Parke, B., said that "if the Act were extended, great injustice might be done in the ordinary case of heriots and other similar rents which become due at uncertain intervals, and also in the possible, though not very probable, case of a rent reserved payable every twenty years, or longer period. In such cases, if the twenty years are to be calculated from the last payment, a party, it may be argued, will lose his right without any default or laches whatsoever when the rent is payable at intervals greater than twenty years, and it is shortened to less than a year where it is payable every twenty years, and no doubt great difficulty may exist in dealing with such cases. But, as to heriots, probably the answer to the objection may be that in a case similar to that now before us the word 'rent' would not include heriots, for though

[1] *Owen* v. *De Beauvoir*, 16 M. & W. 566.

by the interpretation clause the word 'rent' is made to include heriots, yet that is only when the nature of the contest does not exclude such a construction; and it may be that the injustice pointed out would afford grounds for holding that in the clause now under consideration the word rent does not include heriots. A similar observation may be made upon rents at greater intervals than twenty years, and these may be considered either as falling under the general enactment in the second section, so that each particular heriot or amount of rent due may be recovered within twenty years, or is not provided for by the Statute at all, and is left in the same condition as if the Act had not passed." The question may now, in some of its aspects at all events, be considered decided by the recent case of *Lord Zouche* v. *Dalbiac*,[1] being an action for trespass for seizing a heriot; more than twenty years before the heriot in question became due a heriot had become due, which the then lord of the manor did not seize, though he could have done so; yet the right to seize the heriot in question was held not to be barred. The remarks of Bramwell, B., in delivering his judgment in the case, upon the question how far heriots are within the scope of the Act 3 & 4 Wm. 4, c. 27, seem to be of use, and are inserted here nearly in extenso. The learned Baron, in commenting on the words of the Statute, said as follows:—"I cannot say that there was not some general intention present

[1] L. R. 10 Ex. 172.

to the minds of those who were parties to this legislation that heriots should be within the provisions of the Statute. The principal enactment of the Statute is contained in section 2, the remaining sections up to section 29 inclusive being explanatory of section 2. Then comes sections 30–41, dealing with particular subjects, and then comes section 42. Now, it is strange if the framer of the Statute intended heriots to be within section 42 only and not within sections 23 and 34, that he should say, as he does in section 1, that 'the word "rent" shall extend to all heriots.' I should have thought that he would not have mentioned heriots at all till he came to section 42, and there is some difficulty in saying that section 42 applies to heriots, because 'arrears of rent' and arrears of heriots are very different things. I therefore doubt—but I give no opinion on the point—whether it was the general intention of the framer of the Statute to bar, not merely the right to a particular heriot, but the title generally, though it is very likely that the framer had some general intention with regard to heriots, yet if he had he has not used apt provisions for carrying out the intention. And he would see it was unjust to comprise heriots in the general words of sections 2 and 3. If he had intended to bar the title he ought to have enacted as he has done in the case of advowsons in sections 30–34. It is not enough that a patron should omit to present to a benefice once, there must be three omissions in succession,

or a lapse of sixty years, before a patron is to lose his right. If, therefore, it had been intended to bar the title to heriots, one would have expected that, instead of making it depend on whether a heriot was taken on one occasion—which might make it depend on whether there happened to be an animal worth seizing, or whether some wrongdoer who was not worth suing removed it,—the Legislature would have made it depend on whether a certain number of omissions to seize had occurred, or whether some such period as sixty years had elapsed, as in the case of advowsons. Though, therefore, it is likely that there was some general intention of making the title to heriots barrable, yet as there are no particular words applicable to seizing heriots, I do not think such a case as the present can have been in the mind of the Legislature, and happily there are no general words which comprehend the right to seize heriots. The question for us turns on section 2. 'No person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims.' If we are to read 'rent' there as including heriots—(I think we ought not, but supposing we ought),—the effect will be that wherever, in order to recover a heriot it is necessary to bring an action, the section applies and the right is barred. But the section does not say that no person entitled

to seize heriots shall seize heriots but within twenty years next after the time at which the right to seize shall have first accrued, and there is therefore no prohibition against doing what the defendant has done here, and what he might have done before the passing of the Statute. It would be monstrous if, owing to the accident that no tenant dies, and no occasion for taking a heriot arises for more than twenty years, the right should be for ever extinguished. I think if the Legislature had intended to deal with such a case they would have provided as they did in the case of advowsons. There is another consideration derived from section 42. If the words in that section, 'no arrears of rent * * * shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due,' include arrears of heriots, and if the lord lets six years go by after a heriot becomes due without enforcing his right, he cannot recover that particular heriot; and if the right does not occur again within the next fourteen years, then, supposing the plaintiff's construction of the Statute to be correct, the right has gone for ever. For, let the lord do what he may—unless he kills the tenant,—he cannot, during those fourteen years, prevent his title being barred. Such an effect cannot have been intended, and there is great additional weight derived from the opinion of this Court in *Owen* v. *De Beauvoir*.[1]

[1] 16 M. & W. 547, 566.

"The conclusion therefore, to which I come is, that whatever the general intention of the Legislature may have been, they did not intend to touch this particular case; or, that if they did, they have not expressed their intention in words, for there is nothing in section 2 to prevent the defendant doing what he has done, and what before the Statute he had a right to do."

The subject matter of the Act having been thus defined in the first section, the second section limits the time within which such property may be recovered by any owner out of possession. Broadly stated the limit is one of 20 years[1] from the time of the accrual of the right to the owner, the right arising immediately upon cessation of possession by the owner, in simple cases where there is no special relation existing between the parties to account for the non-possession by the owner. Such cases of special relation will be treated of separately later on.[2]

Real property may be recovered within twenty years.

By this section the doctrine of adverse possession in the old sense is abolished; but the term adverse possession is so convenient that it is better, perhaps, still to retain it, though with a variation of meaning. It will, therefore, in this volume mean any possession inconsistent with the title of the lawful owner. The doctrine which formerly prevailed implying a

Adverse possession.

[1] After the 1st January, 1879, the limit will be twelve years.

[2] See Table of Contents, Landlord and Tenant, Mortgagor and Mortgagee, etc.

constructive authority from the owner, and thus excluding the operation of efflux of time in numerous cases, for example in the case of *possessio fratris*, is now abolished, and all possession without the direct authority of the owner may now be considered as adverse. The cases of coparceners, joint tenants, and tenants in common in connection with the question of adverse possession, will be later considered.[1]

When owner simply discontinues possession.

In most, but not in all possible cases, the third section fixes the date on which, in the various circumstances, a right accrues to and time begins to run against the owner. The enumeration of dates, however, is not to be considered exhaustive. In the words of Tindal, C.J., the third section fixes the date when time is to begin to run. "In those cases only in which doubt or difficulty might occur, leaving every case which plainly falls within the general words of the second section, but is not included amongst the instances given by the third section, to be governed by the operation of the second."[2] Some effects of the provisions of this section are curious. Where an owner has received rent as an inheritance, and discontinues the receipt of it, the date of accrual of his right is fixed to be that of the last receipt; but it is obvious that his right to take proceedings to recover the rent would (if it be payable annually) not accrue till a year later, so that,

[1] See Index, S. C. Coparceners, Joint Tenants, etc.

[2] *James* v. *Salter*, 3 Bing. N. C. 553.

in fact, in such a case the owner has only nineteen years instead of twenty during which he may pursue his remedy.

3 & 4 Wm. 4, c. 27, s. 3. Absence of possession.

Absence of possession, as referred to in the third section of 3 & 4 Wm. 4, c. 27, and also, perhaps, generally in cases of limitations, must be accompanied by the actual possession of another. For example, where land was sold with an exception of minerals in favour of the vendor, the right of the latter was not barred by a lapse of more than forty years, no one else having in the meanwhile exercised any rights over the minerals.[1] "The Statute applies, not to cases of want of actual possession by the plaintiff, but to cases where he has been out, and another in, for the prescribed time."[2] And previously to the Statute abandonment was not inferred imply from non use in the case of mines, unless some one had worked them himself, or interrupted the lawful owner.[3]

Minerals.

Alienation.

Where there is an alienation, the right of the alienee accrues upon the alienation, that is usually in cases of alienation *inter vivos* upon the execution of the conveyance.[4] There is a curious question as to the meaning of the words "other than a will," in section 3 of the Statute.[5] These words were much

[1] *Smith* v. *Lloyd*, 9 Exch. 562, and 23 L. J. Exch. 194; *McDonnell* v. *McKintay*, 10 Ir. L. R. 514.

[2] *Per* Parke, B., *Smith* v. *Lloyd*, Ibid.

[3] *Seaman* v. *Vaudrey*, 16 Vesey, 390.

[4] *A.-G.* v. *Flint*, 4 Ha. 147.

[5] 3 & 4 Wm. 4, c. 27, s. 3. See Appendix.

considered in *James* v. *Salter*.[1] In that case Tindal, C.J., says that these words carry the matter no farther than if the third section had attempted to enumerate all kinds of dispositions, and had omitted to mention wills, and that consequently dispositions by will are included in the comprehensive terms of the second section.

Reversionary interests.

Where the interest is in reversion, or remainder, or generally of a future nature, the right by virtue of section 3 of the Act of the reversioner accrues on the reversion falling into possession. The words of the section are comprehensive enough, and will include all executory devises.[2]

It has been decided that the saving in favour of a reversioner, by which time does not run against him as regards the property of which he is reversioner till it falls in, extends also to his right to a remedy for equitable waste against the intervening tenant for life or years.[3] In the case of the *Duke of Leeds* v. *Amherst*, where the decree was made thirty-eight years after the commission of the waste, Shadwell, V.-C. of England thus describes the principle upon which a wrongdoer is not protected by time :—"That the author of a mischief is not to complain of the result of it * * * is a

[1] 3 Bing. N. C. 553.

[2] *James* v. *Salter*, 3 Bing. N. C. 554. See as to the new Act, the 37 & 38 Vict., c. 57, s. 2.

[3] *Duke of Leeds* v. *Amherst*, 2 Phill. C. C. 117; 20 Beav. 239; 14 Sim. 357. See *Morris* v. *Morris*, 4 Jur. N. S. 964–6.

proposition supported by the Holy Scriptures and by the decisions of our own Courts of Equity," and he further quotes St. Matthew's Gospel, chap. 26, v. 52, and Ovid.[1] But the advantage may be lost by the reversioner through laches, even before the expiration of twenty years, as in *Harcourt* v. *White*,[2] where the bill was dismissed, though filed two days before the expiration of twenty years from the waste.

Forfeiture.

No one is obliged to take advantage of a forfeiture. This is old law, and is preserved by section 4 of the Real Property Statute.[3] This section is commented on by the Master of the Rolls in the recent case of *Astley* v. *Earl of Essex*, as follows:—"I think I must hold that the effect of the Statute is to give a remainderman the right to enter at the termination of the prior estate [notwithstanding a forfeiture]. I think that the true way of reading the Statute is to give the words 'forfeiture' and 'breach of condition' their largest sense, and to make them apply whether the forfeiture give a right to an estate under a conditional limitation, or whether it is a true forfeiture at law, which can only be taken advantage of by the heir. I think, therefore, the true view of this case is that whether

[1] "πάντες γὰρ οἱ λαβόντες μάχαιραν ἐν μαχαίρᾳ ἀπολοῦνται." —*Matt., keph.* 26, v. 52.
"Neque enim lix æquior ulla quam necis artifices arte perire suâ." Ars. Amant., Lib. 1, v. 655.

[2] 28 Beav. 303.

[3] *Doe* d. *Cook* v. *Danvers*, 7 East, 299; *Doe* d. *Allen* v. *Blakeway*, 5 Car. & P. 563.

the name and arms clause applied to Thomas George Corbett or not (on which point I will hear further argument) the Statute of Limitations cannot apply. If the name and arms clause did not apply to Thomas George Corbett, then of course there has been no forfeiture, and on the death of Thomas George Corbett, as he did not bar the entail, and died without issue, the next remainderman, whoever he was, would be entitled to possession. If the clause did apply to Thomas George Corbett, then I hold that the title of the remainderman accrued by forfeiture or breach of condition within the meaning of the fourth section of the 3 & 4 Wm. 4, c. 27; that those words include every case of forfeiture or breach of condition, whether the effect of the forfeiture was to accelerate another estate under what is sometimes called a conditional limitation, or whether the effect of the forfeiture was merely to give a right to the heir to re-enter under the old common law rule; and that this section was intended to apply to both those cases, and consequently the original right, if I may call it so, of the remainderman to enter on the expiration of the previous estate in the natural way upon the death of the tenant for life, is not taken away by the tenant for life committing a forfeiture. To hold otherwise would have a very strange result. Take, for instance, the case of a clause of forfeiture and conditional limitation over by reason of the tenant for life not residing for six months every year at

the mansion house, a point which is exceedingly difficult to ascertain, because residence has been decided not to require that a man shall actually sleep there every night; then if the tenant for life broke this condition, and lived twenty years after, he would acquire a fee simple, unless the fourth section applies to such a case. I think that such a result would greatly surprise the remainderman, and it would really be too absurd. I must therefore read the fourth section in its widest sense, and hold that it applies to such conditional limitations as these, as well as to other cases of forfeiture." [1]

Thus a reversioner on an estate for years or lives, has twenty years within which he may pursue his remedy after his reversion falls *naturally* into possession, independently of any right which he may previously have acquired, but has not exercised to the same by reason of any forfeiture. *Cook* v. *Danvers* [2] is a strong case. A life estate was erroneously taken under a will by one of the attesting witnesses, yet it was held that the lawful owner's right accrued anew as a reversioner on the death of the wrongful life tenant.

The case, however, is not quite free from doubt where the particular estate subject of the forfeiture is so limited as to be absolutely determined and void on occasion of such forfeiture. Thus, where there is not merely a provision of re-entry in a lease on forfeiture, but it is provided that the lease

[1] L. R. 18 Eq. 290. [2] *Ubi supra.*

thereupon shall absolutely determine and be void, without any act on the part of the reversioner, that is the lessor, it has been suggested that the reversion must be taken then to have fallen in when the forfeiture occurred, and that time runs against the lessor from that date. It is, however, probable that should the question be tried it would be held that a lease, with such a provision, becomes void only at the option of the lessor, inasmuch as it is not allowed for any one to take advantage of his own wrongdoing.[1]

Entry and and continual claim.

By sections 10 and 11 of the Real Property Act, the effect of merely formal entry, and continual claim to prevent time running against the rightful owner, is abolished. An entry now to be effectual for that purpose must be accompanied with an actual resumption of possession.[2] Even previously it was necessary that the entry should be made *animo clamandi*. Thus, where the plaintiff had entered a cellar on the invitation of the defendant, and to view its antiquity, it was no sufficient entry,[3] but

[1] *Read* v. *Farr*, 6 M. & S. 121; *Malins* v. *Freeman*, 4 Bing. N. C. 395; *Hyde* v. *Watts*, 12 M. & W. 254; *Hughes* v. *Palmer*, 19 C. B. N. S. 393. See also *Roberts* v. *Davey*, 4 B. & Ad. 664, and the note to *Dumpor's Case*, Smith's L. C., vol. i., p. 36–39. And as to forfeiture of leases, see *infra*, under Landlord and Tenant.

[2] *Doe* d. *Baker* v. *Combes*, 9 C. B. 714; 13 L. J. C. P. 306; *Randall* v. *Stevens*, 2 Ell. & Bl. 641; *Brassington* v. *Llewellyn*, 27 L. J. Exch. 297; *Allen* v. *England*, 3 F. & F. 49. And see 3 & 4 Wm. 4, c. 27, secs. 10 and 11.

[3] 2 Cruise, Dig. 501; 1 Plowd. 92, 93.

entry might be made on behalf of a party by his privies, for instance, by a *cestui que trust* on behalf of a trustee.

Presumption of death and survivorship.

The doctrine of our Courts as to presumption of death and survivorship is not as yet in a wholly satisfactory state. The rule now adopted is broadly as follows, that after seven years' disappearance, death is presumed, but that there is no presumption as to the period of the death.[1]

When, therefore, there is no evidence as to the precise date of death within the seven years, that party to whose title it is necessary to prove the exact date will fail. It is, however, often a doubtful question on whom the onus of proof is thus shifted. Thus the onus apparently lies on a pecuniary legatee to prove the date as against a residuary legatee, as well as against next of kin, for a residuary legatee may say he is entitled to everything except what is proved not to come to him.[2] But this, perhaps, applies only to cases where the fund is in Court or elsewhere in neutral hands, and possibly if it were once in the hands of a pecuniary legatee, the onus of proof might be shifted to the residuary legatee or the next of kin, if they desired to get it out of his possession.

Malins, V.-C., in a rather recent case,[3] indeed de-

[1] *Doe* v. *Nepean*, 5 B. & Ad. 86; *In re Phene's Trusts*, L. R. 5 Ch. 139; *In re Lewes' Trusts*, L. R. 6 Ch. 356; *In re Green's Settlement*, L. R. 1 Eq. 282.

[2] *In re Lewes' Trusts*, 6 Ch. 356.

[3] *In re Benham's Trusts*, L. R. 4 Eq. 416.

cided that life must be presumed till the close of the period of seven years (and he has subsequently adhered to the same opinion.)[1] On the other side, according to the judgment of the Court of Exchequer Chamber in *Nepean* v. *Doe*, which is usually regarded as correct, of all points of time the last day is the most improbable for the real date of the death. It is much to be desired that some rule, even a merely arbitrary one, should be settled on the subject. In a recent criminal case arising out of a trial for bigamy, it has been held that the question whether a husband who had not been heard of for seven years, and was thus presumed to be dead, was to be presumed to be dead four years only after such disappearance (at which time his wife or widow married anew) was a question to be left to the jury.[2]

Presumption of death and survivorship.

Where two or more persons die about the same time, and there is no evidence as to priority of death, no presumption is raised in English law as to survivorship by the age or sex of the persons. The survivorship of commorientes must be decided by evidence, if any can be obtained, and if there is none, must remain undetermined.[3]

Independent trespassers.

There is a considerable difficulty in ascertaining

[1] *In re Westbrooke's Trusts*, W. N. 1873, p. 167.

[2] *Reg.* v. *Lumley*, L. R. 1 C. C. 196.

[3] *In re Phene's Trusts*, L. R. 6 Ch. 145; *Dowley* v. *Winfield*, 14 Sim. 277; *Mason* v. *Mason*, 1 Mer. 308. The case of commorientes is carefully provided for by the law of France. Cf. Code Civ., Sects. 721–23.

the position of an occupier of land without title as against third parties while time has not as yet run in his favour. As against the true owner, of course he has no title at all, but it seems that he may have a *quasi* title as against simple trespassers. In *Dixon* v. *Gayfere*,[1] where there had been several successive and independent occupiers, all without title, and the possession came to the Court of Chancery, Romilly, M.R., decreed possession to the last occupier expressly on the ground that at law he could have maintained his possession against all but the true owner, who in that case was barred by lapse of time. But the authority of this decision was questioned at law in the case of *Asher* v. *Whitlock*,[2] where Cockburn, C.J., expressed his opinion that whatever equity might say to the rights of different claimants who had come in at different times without title, yet that at law the title of the original possessor was clear.[3]

This opinion was concurred in by Mellor and Lush, JJ. It is, however, submitted that whatever difficulties may exist in the theory countenanced by the Master of the Rolls (namely, that the last of a series of independent occupiers without title at the expiration of twenty years obtains a statutory possessory title), yet that equal or greater difficulties will be found in any theory which gives back the title to the first of such occupiers at the expiration

[1] 17 Beav. 421.

[2] L. R. 1 Q. B. 1. See *Doe* v. *Dyball*, Mood & M. 346; *Doe* d. *Carter* v. *Bernard*, 13 Q. B. 945; and 18 L. J. Q. B. 306.

[3] Ibid., p. 6.

of such statutory period. Thus, in *Goodtitle* v. *Baldwin*,[1] where the plaintiff claimed a title by possession, but the defendant had been in possession for seventeen years previously to the suit, it was held that the plaintiff must recover by the strength of his own title, and not by the weakness of that of the defendant. The interest which a simple occupier without title has in land is an interest nevertheless which is devisable by his will.[2]

Where a will purports to deal with property not belonging to the testator, and to give a life interest therein with remainder over, and a person enters as tenant for life under the will, he and those privy to him in estate are estopped from disputing the will and setting up a possessory title after twenty years' possession as against the remainderman.[3] The question, indeed, is one of estoppel, as is shewn in the case of *Board* v. *Board*.[4] The judgment of Blackburn, C.J., which sufficiently shows the facts of the case, illustrates the point. He says:—"In this case I think the plaintiff is entitled to our judgment. The facts are that Robert Amesbury was tenant by the curtesy, and consequently when he died he had nothing to devise. Joseph Amesbury was the heir-at-law, and but for the Statute of Limitations would be entitled

[1] 11 East, 488.

[2] *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Hawksbee* v. *Hawksbee*, 11 Hare, 230; *Anstee* v. *Nelms*, 1 H. & N. 225.

[3] *Board* v. *Board*, L. R. 9 Q. B. 48; *Anstee* v. *Nelms*, 1 H. & N. 225. But see *Paine* v. *Jones*, 18 Eq. 320.

[4] *Ubi supra*.

to the estate. Robert Amesbury, however, made a will, leaving the property to Rebecca for life, with remainder to William in fee. Rebecca entered into possession, and enjoyed the property under the will, paying the legacies and annuities, and in every way clearly showing that she continued in possession because she was a devisee under the will. She lets the defendant into possession, who claims under her, but he, being privy in estate to her, is subject to all the estoppels that would have estopped her. Then the question is, whether Rebecca, having taken under the will which gave her an estate for life, is not estopped from saying that as against William or the person claiming under him, the will under which she came in as tenant for life and William was remainderman, is void; she cannot be allowed to assert that, although she was let in and enjoyed under the will, nevertheless it was void; and that the heir-at-law, Joseph, is entitled to the land, and as twenty years have run against his title, he is barred, and she, having acquired the fee by twenty years' undisturbed possession, can prevent William from taking under the will. Rebecca claimed under the will, and retained possession under the will, and she, as against everybody interested in the will, is estopped from denying its validity.

"The case is like that of a tenant coming in under a landlord: he is estopped from denying his landlord's title. As to the point that Robert, being only a tenant by the curtesy, had nothing to devise, it

may be said that, in many instances, the landlord has only an equitable title, and yet the tenant is estopped from disputing such title. I think, if the law were otherwise, the consequence would be disastrous, for how unjust it would be if a person who comes in under a will as tenant for life, and continues in possession until twenty years have elapsed, could say there was a latent defect in the title of his predecessor, and the estate devised really belonged to the heir-at-law, and his title being barred, he, the tenant for life, is entitled to the property in fee simple. It is contrary to the law of estoppel that he who has obtained possession under and in furtherance of the title of a devisor, should say that such title is defective. My Brother Martin, in *Anstee* v. *Nelms*,[1] says that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter, and then say that such possession was unlawful, so as to give to his heir a right against a remainderman. That seems directly in point. It is good sense and good law. All we have to decide here is, that Rebecca having entered under the will, William, the remainderman, under the same will, has a right to say that she and all those claiming through her are estopped from denying that the will was valid."

But it seems that if the will does not purport to pass the land in question, it may be otherwise. Thus, a testator by a will, dated in 1824, devised all

[1] *Ubi supra.*

his real and personal estate, and also all other his estate and effects of which he might be possessed at the time of his decease, to his wife and another trustee, in trust to pay the rents to his wife for life, with remainders over. The testator purchased a freehold estate after the date of his will. On his death his widow (the other trustee having disclaimed) became sole trustee of his will, and entered into possession of the after-acquired property as well as the devised estate, believing that all the property passed by the will. She continued in possession for more than twenty years, and then, being informed that she had acquired a title by adverse possession, she sold the estate to a purchaser for value; and it was held upon a bill filed by the remainderman under the will to oust the purchaser, that the tenant for life had acquired a good title by adverse possession against the remainderman, and the bill was dismissed accordingly.[1]

How far retrospective.

The Statute 3 & 4 Wm. 4, c. 27, has not any application so as to give a title to a person who had quitted possession before the commencement of the Act. Thus, where a plaintiff had been let into possession of land in 1807, as tenant at will, and continued in possession till 1831, without making any acknowledgment of tenancy or paying rent, and then quitted possession, it was held that he had acquired no title to the land, and that his heir-at-law was unable to bring ejectment by virtue of 3 & 4

[1] *Paine* v. *Jones*, 18 Eq. 320.

Wm. 4, c. 27, even against a stranger. Patteson, J., was of opinion that the case would have been quite different if the tenant at will had continued in possession, but that after the possession had been long determined, it could not be that a title could arise by the passing of the Act.[1]

Copyholds.

The Statute applies to copyholds.[2] Where it is clear that by the provisions of 3 & 4 Wm. 4, c. 27, the title of a claimant to copyholds is barred by lapse of time, the Court will not compel the lord by mandamus to admit him.[3]

Similarly in equity, a prayer for admittance was refused where the title of the claimant was barred by Statute.[4]

The lord of a manor is barred by the Statute from entering for a forfeiture after the lapse of twenty years.[5]

Effect of settlement of property.

After the Statute has once begun to run, a person cannot, by putting the estate into settlement, give new claims to persons taking under such settlement. This rule, which is consistent with good sense, is applicable to every kind of property.[6]

[1] *Doe* d. *Thompson* v. *Thompson*, 6 A. & E. 721.

[2] *Rex* v. *Lord of the Manor of Agarsdley*, 5 Dowl. 19; *Widdowson* v. *Earl of Harrington*, 1 Jac. & W. 532; *Phillips* v. *Ball*, 6 Jur. N. S. 48; *Doe* v. *Hellier*, 3 T. R. 162; *Whitton* v. *Peacock*, 3 Myl. & K. 325.

[3] *Rex* v. *Lord of the Manor of Agardsley, ubi supra.*

[4] *Widdowson* v. *Earl of Harrington*, 1 Jac. & W. 532. This case was decided under the Statute of James.

[5] *Whitton* v. *Peacock*, 3 Myl. & K. 325.

[6] *Stackpoole* v. *Stackpoole*, 4 Dru. & War. 320; *Gery* v. *Redman*, L. R. 1 Q. B. D. 161.

CHAPTER X.

REAL PROPERTY—ESTATES TAIL.

Estates tail.

PREVIOUSLY to the Act of William the Fourth the rights of issue in tail and remaindermen upon estates tail in reference to the limitation of actions were regulated by 21 Jac. 1, c. 16, s. 1,[1] but now they are exclusively regulated by sections 21, 22, & 23 of 3 & 4 Wm. 4, cap. 27,[2] and by the new Act.

The wording of these sections deserves particular attention, but the broad effect of the 21st section is in any case where a tenant in tail has become barred himself by efflux of time to cause the bar to extend to all those after him whose title he could by his own act have barred; and the section following provides similarly for the case of such a tenant in tail dying during the period when time is running against him. The joint effect of the two sections is therefore to bar the rights of any person whose remainder the tenant in tail could have barred himself by a proper assurance, and without the consent of a protector or other party at the end of twenty years

[1] Appendix.

[2] Appendix. By the new Act, 37 & 38 Vict., c. 57, s. 6, which comes into operation on the 1st January, 1879, the period is reduced from 20 years to 12 years.

from the period when time commenced to run against such tenant in tail, whether such twenty years expires in his lifetime or not. This is only true, however, where the tenant in tail is barred by laches or voluntary abandonment, and not where he has by a defective assurance conveyed away the property, in which case he cannot enter against his own grant, and time will not begin to run till his death.[1]

It seems, indeed, that issue in tail are barred by sections 1 and 2 of the Act and that the sections now in discussion apply principally to the subsequent remaindermen,[2] and previously under the Statute of James though the issue in tail might be barred for any length of time, yet on the ultimate failure of such issue the right of the remainderman arose and he was allowed a fresh period of twenty years to pursue his remedy.

We have now seen how the issue in tail and remaindermen may be deprived of their rights, through the laches of their predecessors; but there yet remain those cases where the tenant in tail has voluntarily conveyed away his interest by an assurance defective in some way, either, for instance, ineffective against the issue in tail by reason of non-enrolment, or against the remaindermen though enrolled through

1 *Earl of Abergavenny* v. *Brace*, L. R. 7 Ex. 145—53.

2 *Earl of Abergavenny* v. *Brace*, L. R. 7 Ex. 145; *Cannon* v. *Rimington*, 12 C. B. 1; 21 L. J. C. P. 137; *S. C.* in Ex. Ch. 12 C. B. 18; and 22 L. J. C. P. 153.

the absence of the consent of the protector. The latter case is expressly provided for by the 23rd section of the Act we are now considering.[1]

Defective assurance.

The sole effect of this section seems to be to enlarge a base fee into a fee simple. In a case where the tenant in tail has by a deed duly enrolled so as to bind the heirs in tail, but without the consent of the protector, and therefore not so as to bind the remaindermen, conveyed away his property and thus created a base fee in the assignee, this base fee may be enlarged into a fee simple by expiration of the usual period of twenty years. This period, however, dates only, and time commences to run only from the time when the assurance, otherwise valid but defective from want of the concurrence of the protector, would, if then executed, not need such concurrence, owing, for example, to the assurer having in the meantime become tenant in tail in possession.

It was one of the propositions of the Real Property Commissioners, that on any alienation by a tenant in tail, by any assurance not operating as a complete bar to the estate tail, and all estates, rights, and interest, limited to take effect on the determination or in derogation of it, possession under such assurance should have the same effect in barring the estate tail and all estates, rights, and interests so

[1] Appendix.

[2] *Mills* v. *Capel*, L. R. 20 Eq. 692; W. N. 1875, p. 161; *Morgan* v. *Morgan*, 10 Eq. 99; *Penny* v. *Allen*, 7 D. G. M. & G. 409; Sugden, R. P. S. 2nd ed., p. 86.

limited as if such possession had been adverse to the estate tail, or to such estates, rights, and interests. And in commenting upon this proposition, Lord St. Leonards, in his work on the Real Property Statutes says :—" These intentions were carried into effect by the enactment in the 23rd section before quoted, which requires a possession or receipt for twenty years next after the commencement of the time at which such assurance, if it had then been executed by the tenant in tail, or the person who would have been entitled to his estates tail if such assurance had not been executed, would without the consent of any other person have operated to bar such estate or estates as aforesaid at the end of which twenty years such assurance is made effectual against any claimant after, or in defeasance of such estate tail. The assurance referred to is the one made by the tenant in tail. The operation of the clause therefore is not strictly to make time a bar, but to make time give a full operation to the assurance executed by the tenant in tail."

Defective assurance.

Having thus considered those cases which fall strictly within the letter of the Act where the tenant in tail has made an assurance which is defective only through the non-concurrence of the protector, we shall now proceed to examine those cases where the tenant in tail is out of possession, having made an assurance which is entirely defective against his successors. Now, as we have seen, if a tenant in tail simply abandons possession, the issue in tail and remaindermen (so far as he could lawfully have barred

the latter) would lose their rights in twenty years from such abandonment. On the contrary, where the tenant in tail has conveyed away his interest, so that as far as he is concerned the possession of his assignee is not adverse, time will not run during the life of such tenant in tail.[1]

This is already shown in *Cannon* v. *Rimington*.[2] In that case a tenant in tail had made a feoffment of the land to a third person, and more than twenty years elapsed during his life without any interruption of the possession of the feoffee or those claiming under him, and upon a succeeding tenant in tail taking proceedings it was contended by the defendant that the plaintiff was barred by the Statute; but the Court held that though if the tenant in tail had been dispossessed, and so had a right of entry for more than twenty years, his successor would be barred yet as by his feoffment he had deprived himself of his right of entry during his life, the Statute did not apply.[3]

Indestructible entail.

An indestructible entail created by Act of Parliament with a proviso that no Act "made, done, suffered, or acknowledged," shall bar the successors, is excluded from the operation of the Statute Law of Limitations, as the word suffered is not to be restricted to its technical meaning of suffering a re-

[1] *Cannon* v. *Rimington*, 12 C. B. 1; 21 L. J. C. P. 137; *S. C.* in Ex. Ch. 12 C. B. 18; and 22 L. J. C. P. 153.

Ibid.

[3] See remarks of the L. C. at 12 C. B. p. 16.

covery, so that a permissive occupation through the laches (even without collusion) of a tenant in tail will not give the occupier any title against the tenant in tail's successors;[1] with regard to the inconvenience of the indestructibility of such an estate, Cleasby, B., remarks that in reality such an estate would among all persons dealing with it be marked and known as having a strict parliamentary entail, and that they would deal with it knowing that no good title could be made or acquired as against a succeeding tenant in tail.[2]

It appears that there is no saving in regard of disabilities or acknowledgments in the case of remainders upon estates tail,[3] so far as they are governed by the 23rd section of the Act; so far, however, as the rights of such reversioners and of the issue in tail are governed by sections 1 and 2, or sections 21 and 22 of the Act, they will no doubt have the advantage of the savings in case of disability, and of acknowledgments provided for in sections 14 and 16 of the Act.

[1] *Earl of Abergavenny* v. *Brace*, L. R. 7 Ex.; *per* Channell and Cleasby, BB., *dissensiente*, Bramwell, B.; *Stratfield* v. *Dover*, Moore, 467; *Magdalen College Case*, 11 Co. Rep. 66, b.; 1 Roll. Rep. 151.

[2] *Earl of Abergavenny* v. *Brace*, Ibid., 161.

[3] *Goodall* v. *Skerratt*, 3 Drew. 216; 24 L. J. Ch. 323.

CHAPTER XI.

ACKNOWLEDGMENTS.

3 & 4 Wm. 4, c. 27, s. 14. Acknowledgment must be in writing.

THE 14th section, as has been seen, causes time to run afresh, when a proper acknowledgment is given, from the time of such acknowledgment, or where several acknowledgments have been given, from the time of the last. It has been suggested by Lord St. Leonards, that the giving an acknowledgment may thus cause time to commence to run from the date of an acknowledgment, even when otherwise it would not have commenced to run as early.[1] It seems, however, probable that if it should be necessary to decide the question, that it would be more consistent with the spirit of the Act to hold that the period is to be calculated from the date of an acknowledgment only when that is subsequent to the date from which time would otherwise be calculated.

Must be signed personally.

An acknowledgment under this section must be signed personally, and signature by an agent will not, as a rule, be sufficient.[2] Notwithstanding this, however, a signature may, it seems, be so signed by

[1] *Scott* v. *Nixon*, 3 Dru. & War. 388.

[2] *Ley* v. *Peter*, 3 H. & N. 101.

an agent under the immediate direction and supervision of the principal so as to be in effect the signature of the principal, especially where the latter is incapacitated by illness or otherwise from signing himself.[1]

To whom.

The acknowledgment must be given to the person lawfully entitled, or his agent, so that an acknowledgment to third persons or the public generally will not suffice. However, where there was a stone in a boundary wall, with an inscription to the effect that the wall was the property of persons not then in possession, and to whom no other acknowledgment had been given for upwards of forty years, it was held on appeal reversing the decision of Malins, V.-C., that it was idle to suppose that in such a case any question of the Statute of Limitations or of adverse possession could properly arise.[2]

Terms of acknowledgment.

No particular form of acknowledgment is required under the section, but any is sufficient which practically amounts to an admission of the lawful owner's title, and there is no rule, in analogy to the rule requiring that an acknowledgment of a simple contract debt shall amount to a promise to pay, which renders it needful that an admission of the lawful owner's title should, to be effectual, contain any promise of restitution.

Sufficiency of

As a general rule, the question, what terms are

[1] *Lessee of Corporation of Dublin* v. *Judge*, 11 Ir. L. R. 8. And see under Signatures.

[2] *Phillipson* v. *Gibbon*, L. R. 6 Ch. 434.

terms is a question for the Court.

sufficient to constitute a binding acknowledgment in a case of this kind, is a question for the Court, not for the jury.[1] But where an acknowledgment was to be gathered from the terms of a lengthened correspondence between parties, it was left to the jury to decide whether, in fact, the correspondence contained an acknowledgment.[2]

[1] *Doe* d. *Curzon* v. *Edmonds*, 6 M. & W. 295; *Morrell* v. *Frith*, 3 M. & W. 402; Lord St. Leonards' R. P. St., p. 67.

[2] *Incorporated Society* v. *Richards*, 1 Dru. & War. 258.

CHAPTER XII.

EQUITY.

Equity follows the law.

By section 24 of the Act of William the Fourth,[1] express provision is made that the rule as to actions at law shall extend to proceedings in equity. In this respect, it is true, equity always followed the law, and this enactment does little more than give a statutory sanction to a well-established rule of the Courts of Equity.[2] Previously, the Courts of Equity were usually said to act in analogy to the Courts of Law, but Lord Redesdale went further than this in *Hovenden* v. *Lord Annesley*, and stated that Courts of Equity acted not merely by analogy of, but in obedience to the then existing Statutes of Limitation.[3] Thus there was no limit in equity to the recovery of rent-charge at a time when no bar existed by Statute.[4]

Stale demands.

The jurisdiction which the Court of Chancery has always had to discourage stale demands, and to refuse to entertain cases where the plaintiff has lost

[1] See Appendix.

[2] *Hollingshead's Case*, 1 P. W. 743; *South Sea Company* v. *Wymondsell*, 3 P. W. 143; *Edsell* v. *Buchanan*, 2 Ves. 83; *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 56.

[3] 2 Sch. & Lef. 629.

[4] *Archbold* v. *Scully*, 9 H. L. C. 360.

his moral right to relief through laches or acquiescence, is expressly reserved to the Court by section 27 of the Real Property Act,[1] as to the cases which are within the provisions of that Act. The rules as to acquiescence and laches, inasmuch as they depend upon principle and not upon parliamentary drafting, are for the most part uniform as to all descriptions of property, and will be subsequently considered together.

Extreme period of limitation is forty years;

but a sixty years' title is still necessary.

By section 17 of 3 & 4 Wm. 4, c. 27, a period of forty years is fixed as the extreme limit within which any proceedings may be taken.[2] Notwithstanding this, a sixty years' title is still necessary, and the rule which requires a vendor to give it in the absence of conditions to the contrary, remains unaltered. "One ground of this rule," remarks Lyndhurst, L. C., was the duration of human life, and that is not affected by the Statute."[3] The 17th section, just referred to, was decided to be retrospective in *Doe* d. *Corbyn* v. *Bramston*.[4] But the question seems not to be free from doubt, as the words are perhaps in strictness prospective and different from those in some other sections, the 26th, for example; and in the learned note to *Nepean* v. *Doe*, in Smith's Leading Cases,[5] it is suggested that the question may be still open.

It is a principle that whenever a party applies to

[1] Appendix.
[2] Appendix.
[3] *Cooper* v. *Emery*, 1 Phill. C. C. 388.
[4] 3 Ad. & Ell. 63.
[5] 2nd Vol. p. 662.

a Court of Equity, and carries on an unfounded litigation, protracted under circumstances and for a length of time which deprive his adversary of his legal rights, a substitute for the legal right of which the party so prosecuting an unfounded charge has deprived his adversary should be supplied and administered.[1]

Equity will remove a bar it has itself caused.

[1] *Pulteney* v. *Warren*, 6 Vesey, 73. But Cf. *supra*, p. 33.

CHAPTER XIII.

CONCURRENT RIGHTS.

Concurrent rights.

FORMERLY in cases in which two rights co-existed in the same person he was able to take full co-advantage of both. This was in accordance with the old text of civil law, *quando duo jura concurrunt in unâ personâ æquum est ac si essent in diversis.*[1] Thus, according to Plowden, in *Stowel* v. *Lord Zouch*, when there are three several rights in the same person, he shall have the like benefit of them as three persons should have.[2] But this old and well-established principle of law is abolished for the future by s. 20 of 3 & 4 Wm. 4, c. 27, as regards cases within the purview of that Act, by which, when the right to an estate in possession is barred, the right of the same person to future estates will also be barred. The section is as follows:—

"And be it further enacted, that when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest

[1] Plowden, 368. [2] Plowden, 374.

in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him to recover such land or rent in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession."

This section makes an exception to the rule which always allows a reversioner a fresh right on the falling in of his reversion under section 5 of the same Statute. The latter section applies only to cases where the estate or interest claimed is an estate or interest in a reversion expectant on the determination of a particular estate in some other person, and not to the case where the same person who has the reversion has also the particular estate.[1]

In *Doe* d. *Johnson* v. *Liversedge*,[2] copyhold lands Doe v. Liversedge.

[1] *Doe* d. *Johnson* v. *Liversedge*, 11 M. & W. 517; *Doe* d. *Hall* v. *Mousdale*, 16 M. & W. 689.

[2] *Ubi supra.*

were surrendered in 1798 to husband and wife for their joint lives with remainder to the heirs of the husband. In 1805 the husband absconded and went abroad, and was never afterwards heard of. In 1807 a commission of bankruptcy issued against him, and the usual assignment of his estate was made by the commissioners to his assignee. The wife occupied the copyhold estate until her death in 1841, whereupon the assignee was admitted. On these circumstances it was held that an ejectment by the assignee brought after her death was in time, for that the husband's reversion in fee was a future estate within the meaning of the 3 & 4 Wm. 4, c. 27, s. 3. And the Court thought that supposing the twentieth section to apply, the proviso at the close thereof applied also, because the wife had been in possession during the whole period of her life until the time of her death, and though she had not recovered that possession by virtue of legal proceedings, it seemed to the Court a sufficient recovery for the purposes of the section that she had been in actual possession during the whole period of her life, and that until her death, therefore, there would be no right in the assignee to take possession.

CHAPTER XIV.

JOINT TENANTS AND TENANTS IN COMMON.

According to the old doctrine of our law possession by one of a number of joint tenants or tenants in common was equivalent to the possession of all. Thus it is laid down in *Smales* v. *Dale*,[1] that the entry of one tenant in common should be taken generally as an entry for his companions as well as for himself. And it was the same in the case of co-parceners.[2] The reason of this of course was the privity of interest existing between all the parties. "There is," it is laid down, "a great diversitie holden in our books, where one hath a colour or pretence of right, and where he hath none at all."[3] Joint tenants. Old law.

Yet even under the old law this presumption was liable to be rebutted on proof that there had been an express ouster, or by any circumstances inconsistent with the possibility of the acquiescence of those who were out of possession of their shares.[4] And, indeed, a forcible ouster was not always necessary. Thus, where one tenant in common remained

[1] Hob. 120.

[2] *Doe* v. *Keen*, 7 Term Rep. 386.

[3] Co. Litt. 243 b.

[4] *Page* v. *Selby*, Bull. N. P. 102*b*; Co. Litt. 242.

in possession, claiming the whole property, and denying possession to the other, it was considered to be different from the mere act of receiving the whole rent which might be equivocal, but to be certainly an ouster of his companion.[1] It was held in *Peacable* v. *Read*,[2] that the fact of ouster was one to be found by a jury.

New law.

Now, however, the old law has been changed by s. 12 of the Act 3 & 4 Wm. 4, c. 27, as to cases coming within the scope of the Act. The section is as follows :—"When any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them."

This section has been held to be retrospective, and to make the sole possession of a joint owner adverse in the later sense of the term from its commencement; if, however, the possession were not strictly adverse at the time of the passing of the

[1] *Helling* v. *Bird*, 11 East, 51; but see *Reading's Case*, 1 Salk. 392.

[2] 1 East, 575.

Act, the remedy would be saved for five years by virtue of s. 15.[1]

If an owner of an undivided share of a property occupy a portion only of the property, even though it be not more than he would be entitled to if the whole were divided, yet the Statute will apply, and the rights of his fellow owners will be lost as to the part so occupied by him.[2]

It is doubtful whether the word "rent" in sections 12 and 13 of the Act now in discussion, extends to rent reserved on a lease. On the one hand the less extended signification of the term is the more usual signification in the Act.[3] On the other hand, in a case in Ireland, where four out of five tenants in common had been in receipt of the entire rent reserved on a lease, the remedy of the fifth tenant was held to be barred.[4]

[1] *Culley* v. *Doe* d. *Taylorson*, 11 Ad. & Ell. 1008.

[2] *Tidball* v. *James*, 29 L. J. N. S. Ex. 91; *Murphy* v. *Murphy*, 15 Ir. C. L. R. 205.

[3] Sugden's Real Property Statutes, p. 47.

[4] *Burrough* v. *M'Creight*, 1 J. & Lat. 290.

CHAPTER XV.

DISABILITIES.

In case the plaintiff in any proceedings for the recovery of any land or rent (as defined in the interpretation clause of the Act) shall have been under certain disabilities at the time of the first accrual of his right, he has, by virtue of the 16th section of the 3 & 4 Wm. 4, c. 27, a period of *ten years* allowed him after the expiration of such disability, in which he may pursue his remedy. This saving provision differs from those which are found in other existing Statutes in *pari materia*, in so far as it allows only *ten* years instead of the full period of twenty years after the cessation of disability, and in this respect it follows the Statute of 21 James 1. The disabilities for which allowance is thus made are infancy, coverture, idiotcy, lunacy, unsoundness of mind, and absence beyond the seas. The terms of the section are as follows:—"Provided always and be it further enacted, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy,

coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid, shall have ceased to be under any such disability, or shall have died (which shall have first happened)." [1]

Imprisonment.

It will be noticed that there is not in the present Act any saving in case of imprisonment of the plaintiff. Such a saving existed in the previous Act of 21 James 1, c. 16, but it is designedly omitted in the present in accordance with the recommendation contained in the first report of the Real Property Commissioners.[2] The reasons for the omission are the ample facilities a prisoner may now have for communicating with his legal advisers, and taking any proceedings he may be advised.

Absence beyond seas.

The saving in cases where the plaintiff is "absent beyond seas" is not removed by the 19 & 20 Vict., c. 97, s. 10 (the Mercantile Law Amendment Act), inasmuch as that Statute, while abolishing the saving in the case of all other existing Statutes of Limitation, omits to mention this section, though it

[1] By the new Act the time will be reduced from ten years to six years. See Appendix, 37 & 38 Vict., c. 37, s. 4.

[2] 1 R. P. R. 44.

purports, by a curious error, to remove such exceptions (which never existed) in sections 40, 41, and 42 of the Act.[1] The words "absence beyond seas" were well known to our Common Law before the enactment of any Statute which contained the words. Thus in a case where a descent was cast after a disseisin, the entry of the disseisee was considered to be tolled, unless the disseisee were "beyond the seas;" and, again, relief against forfeiture of copyhold lands was often allowed, by reason that the defaulters had been absent beyond the seas.[2]

Absence beyond the seas.

The meaning which the words "beyond the seas" are to bear in this country is defined by the following 19th section of the Act, which enacts as follows:— "And be it further enacted, that no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Alderney, or Sark, nor any islands adjacent to them (being part of the dominions of His Majesty), shall be deemed to be beyond seas, within the meaning of this Act." There has, however, been considerable difficulty in con-

[1] See Appendix. The disability of absence beyond seas is removed by the new Act. See Appendix, 37 & 38 Vict., c. 57, s. 3. The policy of this alteration may be doubted. The argument used by Lord Selborne in the House of Lords in advocating the change, namely, that increased facilities of locomotion had diminished the importance of distant absence is open to the criticism that the same facilities have greatly increased the number of persons who may be absent and require the protection of the exception.

[2] *Underhill* v. *Kelsey*, Cro. Jac. 226.

struing the expression in cases where the Act has been adopted in our colonies and dependencies. The question was much considered in the case before the Privy Council of *Ruchmayboye* (*Her Highness*) v. *Lulloobhoy Mottichund*, on appeal from a decision in India.[1] In this case, after much discussion, it was decided that the words were not to be taken literally, but that they were to be read as synonymous with the expression out of the realm, used in the early English Statutes of Limitation, namely the 1 Ric. 3, c. 7, the 4 Hen. 7, c. 24, and the 32 Hen. 8, c. 2, and as meaning outside the British territory.

Infancy.

Notwithstanding, that by the words of the Statute a period of ten years alone is provided after the cessation of the disabilities mentioned, of which infancy is one, during which a plaintiff may pursue his remedies, yet if a father, or other person, enters into the property of an infant, in such a manner as to invest himself with a fiduciary character, the infant will, on attaining his age of twenty-one years have a full period of at least twenty years within which he may seek a remedy.[2] Where a father enters upon the estate of his infant children the presumption is that he enters as their guardian and bailiff, and therefore the Statute of Limitation does not commence to run against the children until they attain the age of

[1] 8 Moo. P. C. C. 4.

[2] *Thomas* v. *Thomas*, 2 Kay & J. 79; *Pelly* v. *Bascombe*, 4 Giff. 390, and 13 W. R. 306; *Nanney* v. *Williams*, 22 Beav. 452; *Hicks* v. *Sallitt*, 3 D. G. M. & G. 782–861.

twenty-one years, and from that time, at least, a child has twenty years during which he may recover possession.[1] And further than this, it appears that if the father retain possession after the children attain their age of twenty-one years, his possession will be considered to be continued in the character in which he entered, and that if he has once entered as a guardian the Court will never allow him to set up any other title.[2]

Infancy.

It was the opinion of Lord Hardwicke in *Morgan* v. *Morgan*[3] that if any person, even a stranger, entered upon the estate of an infant, and continued in possession, a Court of Equity would consider such person so entering as a guardian to the infant, and would decree an account against him, and carry on such accounts after the infancy determined.[4] But now, since the Act 3 & 4 Wm. 4, c. 27, it is doubtful whether the rule laid down by Lord Hardwicke is any longer law in the case of entry by a stranger; and Lord Hatherley, then Sir Page Wood, V.-C., in *Thomas* v. *Thomas*,[5] expressed a great doubt whether the rule above mentioned applies to a stranger, inasmuch as the Statute provides an allowance of only ten years after majority, a provision which would be rendered altogether nugatory if it

[1] *Thomas* v. *Thomas, ubi supra.*

[2] Ibid.

[3] 1 Atk. 489.

[4] See *Blomfield* v. *Eyre*, 8 Beav. 250; *Beddy* v. *Lefevre*, 1 Ha. 602; *Wyllie* v. *Ellice*, 6 Ha. 505.

[5] 2 Kay & J. 79.

were to be held that in every case where a stranger enters upon an infant's estate he enters as bailiff.

However, if a relation, and it is presumed even a stranger, enters upon an infant's estate by virtue of a family arrangement, and in a fiduciary character, the children will have at least twenty years to recover possession after attaining their majority.[1] It is to be noticed, however, that one of the grounds for the decision of the Vice-Chancellor in *Thomas* v. *Thomas* is stated by him to be the fact that it was in evidence that the father of the infants had in that case, while in possession of their estate, given them a proper maintenance, and had, in fact, acted much as he would have done if appointed guardian by and acting under the direction of the Court of Chancery. It is possible, therefore, that had the father in that case improperly spent the proceeds of his childrens' estate, the question might have been more open, the law in regard to limitation of actions in this, as in other cases, offering a premium on mis-behaviour. Infancy.

The section regulating disabilities is expressed to apply only when the party intended to be protected is under disability at the time when the right first accrued, which must be determined by the third section of the same Act; and in those cases where the time of such accrual has been fixed by the Statute, before the period at which any actual right to bring an action or make an entry has arisen, a

[1] *Pelly* v. *Bascombe*, 4 Giff. 390; on appeal, 13 W. R. 306.

person who falls into disability in the interval between those two periods may never have an opportunity of asserting his rights.[1] In fact such a contingency seems to be a *casus omissus* in the Act.[2]

A question might be raised whether on the wording of the Statute a person claiming, for instance, through a conveyance from a person under disability, would have the advantage of the ten years' allowance after the cessation of the grantor's disability, it being often possible for a person under disability yet to be able to convey.

Successive disabilities in different persons;

By the 18th section of the principal Act, now in discussion,[3] it is enacted that successive disabilities in different persons shall not prevent the bar of the Statute. Formerly this had been a doubtful question, though, on the whole, it seems that this section is only declaratory of a principle pretty well established already.[4]

In the same person.

It has now been settled that when the same person falls under successive disabilities which overlap, time does not commence to run against him under this Act till the expiration of the last disability.[5]

[1] See judgment of Parke, B., in *Owen* v. *De Beauvoir*, 16 M. & W. 567.

[2] See, however, Lord St. Leonards' Real Prop. Stat. p. 71; and *Devine* v. *Holloway*, 14 Moo. P. C. C. 290.

[3] See Appendix.

[4] Blanshard, p. 22.

[5] *Borrows* v. *Ellison*, L. R. 6 Ex. 128. And see *supra*, Disabilities in Simple Contracts.

By the 3 & 4 Wm. 4, c. 27, an extreme limit of forty years is fixed in cases of disability. This period is reduced to thirty years by the new Act, which comes into operation on the 1st of January, 1879.[1]

[1] See Appendix, 37 & 38 Vict., c. 37, s. 5.

CHAPTER XVI.

LANDLORD AND TENANT.

The law of landlord and tenant is a branch of that of reversioners.

THE law of landlord and tenant is a branch of the law of reversioners in general,[1] and where a case does not fall within one of the numerous exceptions in the Statute of 3 & 4 Wm. 4, c. 27, it will be governed by the rule regarding reversioners in general contained in section 3 of the same Act; that is to say, that time will not commence to run against the landlord or reversioner till, by the determination of the previous estate, the reversion become an estate or interest in possession. Express provision is made by the Act for the cases of tenancies at will,[2] tenancies from year to year,[3] and leases in writing where the rent is not less than twenty shillings.[4]

But is now chiefly governed by 3 & 4 Wm. 4, c. 27.

Tenancies at will are governed by section 7.

The case of tenancies at will is governed by section 7 of 3 & 4 Wm. 4, c. 27,[5] under which the time commences to run against the landlord either at the determination of the tenancy at will, or at the end of one year from its commencement, whichever first

[1] Smith's L. C., 6th ed. vol. 2, p. 636.
[2] 3 & 4 Wm. 4, c. 27, s. 7.
[3] Ibid., s. 8.
[4] Ibid., s. 9.
[5] See Appendix.

happens. It has been noticed that non-payment of any rent seems assumed in this section,[1] and it is certain that it cannot be intended that the landlord should be barred of his remedy by efflux of time so long as he continues to receive rent from his tenant. Possibly this remarkable difficulty is escaped by the provisions of section 35 of the same Act,[2] or such payment may be a sufficient acknowledgment that the tenant's occupation is permissive.[3]

How far is section 7 retrospective?

There was much discussion as to how far this section is retrospective, a question which, of course, has become almost without importance. It was held that it is not so far retrospective as conjointly with sections 2 and 34, to vest the property in land in a person who had been a tenant at will without payment of rent more than twenty years continuously, but had quitted possession previously to the Act.[4] In *Doe* d. *Evans* v. *Page*, 5 Q. B. 767, Lord Denman expressed an opinion that the section only applied to tenancies at will existing at the passing of the Act or subsequently.

Where a tenancy at will is determined and a new tenancy at will or sufferance created.

If, before the right of entry upon a tenant at will is gone, that is to say, before the lapse of twenty-one years from its commencement the lessor determines that tenancy, and by agreement expressed or implied a fresh tenancy at will is commenced, then the

[1] Lord St. Leonards' R. P. Stat., p. 53 (*n*).

[2] See Appendix.

[3] *Hodgson* v. *Hooper*, 3 Ell. & Ell. 149; 29 L. J. Q. B. 222.

[4] *Doe* d. *Thompson* v. *Thompson*, 6 Ad. & Ell. 721.

period of grace of the lessor must be computed from the commencement of such fresh tenancy at will.[1]

Where, however, the tenancy at will is determined, but a tenancy at sufferance continues, it is perhaps the better opinion that no further time is gained by the lessor,[2] but that he will be barred his remedy at the expiration of twenty-one years from the commencement of the original tenancy at will.

What determines a tenancy at will.

A tenancy at will may be determined by declaration of the lessor,[3] or by any act which amounts to an express or implied ouster; for instance, by entering on the land and cutting down a tree, or actual entry on the land in the absence of the lessee, or by words spoken off the land, if the lessee have notice.[4] In fact, by any act of the lessor inconsistent with the lessee's title, for example, a conveyance by the lessor.[5] On this point, Denman, C.J., in *Turner* v. *Bennett*,[6] remarks, "if he (the landlord) do any act upon the land for which he would other-

[1] *Randall* v. *Stevens*, 2 E. & B. 641; *Hodgson* v. *Hooper*, 3 E. & E. 149; *Locke* v. *Matthews*, 13 C. B. N. S. 753. "If the owner enters effectively and creates a new tenancy at will he has 20 years from that period before he can forfeit his estate." *Per* Erle, C. J., Ibid., 764.

[2] *Doe* d. *Bennett* v. *Turner*, 7 M. & W. 226; *Turner* v. *Bennett*, 9 M. & W. 643; *Locke* v. *Matthews*, 13 C. B. N. S. 753; *Doe* d. *Goody* v. *Carter*, 9 Q. B. 863.

[3] "The lessor may put him (the tenant at will) out at what time it pleaseth him." Co. Lit. 55 b.

[4] Ibid.

[5] *Dimsdale* v. *Iles*, 2 Lev. 88; *Doe* d. *Bennett* v. *Turner*, 7 M. & W. 226.

[6] 9 M. & W. 643.

wise be liable to an action for trespass at the suit of the tenant, such act is a determination of the will, for so only can it be a lawful and not a wrongful act."

Whether a new tenancy is created is a question for the jury.

The question whether, after the determination of a tenancy at will, a fresh tenancy at will is created is one for a jury.[1] As to creation of tenancies at will generally, the reader may consult Co. Litt. 55 a, and as to what is sufficient to create a fresh tenancy at will after determination of a previous one, the case of *Day* v. *Day*, a case on appeal from the Supreme Court of New South Wales.[2] It is provided that mortgagors and *cestuis que trust* shall not be considered tenants at will within this section, but a constructive trustee, for example, a person occupying under an agreement to purchase is not within this exception.[3]

Trustees, etc., not within section 7.

Yearly tenancies.

The subject of yearly tenancies is important. A tenancy from year to year is readily created. It is implied whenever possession is taken legally with an annual payment. It is not affected by the death of or alienation by lessor or lessee, and will continue for an indefinite time, unless determined by a proper notice.[4]

[1] *Doe* d. *Bennett* v. *Turner*. 7 M. & W. 226; *Locke* v. *Matthews*, 13 C. B. N. S. 753; *Doe* d. *Goody* v. *Carter*, 9 Q. B. 863; *Doe* d. *Stanway* v. *Rocke*, 4 Man. & Gr. 30, and 1 Car. & M. 510; *Doe* d. *Groves* v. *Groves*, 10 Q. B. 486.

[2] L. R. 3 P. C. 751.

[3] *Doe* d. *Stanway* v. *Rocke*, 4 M. & Gr. 30.

[4] *Birch* v. *Wright*, 1 T. R. 380.

Yearly tenancies with lease in writing are governed by sect. 8.

Tenancies from year to year, and tenancies for other fixed successive periods, *where there is no lease in writing*, are governed by section 8 of 3 & 4 Wm. 4, c. 27.[1] The ambiguity of the term "rent," which may mean either rent reserved on a lease or an estate in a rent charge, as before noticed, is exemplified in this section. The word occurs three times in the section, twice in the commencement in the latter, and the last time in the former sense. The effect of the section is that the lessor has twenty years from either the end of the first of such years or other periods, or the last payment of rent, whichever shall *last* happen, during which he may pursue his remedy.

How far sect. 8 is retrospective.

Questions similar to those as to tenancies at will were raised as to how far the section was retrospective, and probably decisions affecting one section on this point would be applicable to both. As to such tenancies commenced before, but existing at the time of the act being subject thereto, see *Doe* d. *Jukes* v. *Sumner*.[2]

"A lease in writing" within sect. 8 must be a binding lease.

A lease in writing to take a tenancy out of the operation of this section must be an effectual lease and binding on the parties, not merely a memorandum of the terms of the tenancy. Thus, a writing purporting to be a demise, but really ineffectual, not being signed by necessary parties, was not sufficient.[3]

[1] Appendix.

[2] 14 M. & W. 39.

[3] *Doe* d. *Landsell* v. *Gower*, 16 Jur. 100; 21 L. J. Q. B.

What is a "rent" within section 8.

As to what is a rent sufficient, if rendered to take a case away from the operation of this section, it has been decided that the performance of services for which a distress might be made is equivalent to the payment of rent. Such, for instance, as tolling a bell, or sweeping a church;[1] but it is otherwise with services for neglect of which a distress cannot be made, such as keeping in repair a parish grindstone.[2]

Whether payments made are made on account of "rent."

Where periodical payments have been paid by the lessee to the lessor, it is of course important to consider how far they have been made on account of rent, especially when money has been due to the landlord on other accounts, and in view of the maxim, *quicquid solvitur solvitur secundum animum solventis*.[3] A question also arises as to who must pay the rent. Thus, where the defendant had occupied a sufficient time without himself paying rent, but a person who was undertenant, as he acknowledged himself to be, of the first lessee, had done so to the superior landlord, the latter was not considered barred, and it was said that an undertenant should not dispute a title good against his immediate landlord.[4]

Equitable tenancies.

Where a tenant had been legally tenant at will for

51; 17 Q. B. 589. See, however, remarks of Lord St. Leonards, R. P. Stat., p. 61.

[1] *Doe* d. *Edney* v. *Benham*, 7 Q. B. 976.

[2] *Doe* d. *Robinson* v. *Hinde*, 2 Moo. & R. 441.

[3] *A.-G.* v. *Stevens*, 6 D. G. M. & G. 146: *Doe* d. *Newman* v. *Godsill*, cited at 4 Q. B. 603.

[4] *Doe* d. *Spencer* v. *Beckett*, 4 Q. B. 601.

twenty years without payment of rent, but was in the meanwhile entitled in equity to a long term of years in the same premises, it was considered that in equity he must be regarded as tenant for the longer term, and that in equity the landlord's remedy would not be barred till twenty years from the expiration of that term.[1]

Leases in writing over 20*s.* rent.

Where a lessor has a lease in writing, and the rent amounts to twenty shillings, the case is governed by section 9,[2] the wording of which requires a careful examination. The ambiguity of the word rent is again curiously exemplified.[3] The word is used in all seven times in the section, four times in the sense of the conventional rent reserved on a lease, three times in the sense of an estate in a rent or rent-charge. In the Appendix, the word when it appears to be used in the latter sense is printed in italics. As a rule, where there is a written lease by which a rent of twenty shillings and upwards is reserved, time will never commence to run against the landlord during the existence of the tenancy; but this section introduces one exception to the rule, by which such landlord, as any other reversioner, may, both on general principles and by virtue of section 3 of the Statute, enter any time within twenty years of the termination of the lease.

Time never runs against landlord.

[1] *Archbold* v. *Scully*, 9 H. L. 360.

[2] 3 & 4 Wm. 4, c. 27, ss. 9, and 3. See Appendix.

[3] Darby and Bosanquet, p. 726.

except on payment of rent to a third party.

The exception is this that if the rent has been received by some person wrongfully claiming the reversion, and no rent be received subsequently by the real landlord, then the twenty years' limit commences to run against the real landlord from the first wrongful receipt of rent.[1] This is quite new law; previously, mere receipt of rent did not constitute an ouster subject to the question of acquiescence on the part of the real landlord.[2] The policy of the change is explained in the report of the Real Property Commissioners.[3]

It is important to notice that it seems that a single payment to a person claiming wrongfully the reversion is sufficient to set time running against the true owner if no payment is afterwards made to the latter, so that at the end of twenty years the true owner may lose his remedy without his rights being transferred to the wrongful claimant. On the other hand, it is a principle, where there is a lease in writing, that the tenant can never acquire a title against his landlord.[4]

Effect of payment direct by undertenant to superior lord.

Where there is a mesne tenant between landlord and undertenant, and the latter pays rent to the landlord immediately, instead of to his immediate

[1] Smith's L. C., vol. ii., 6th ed., 643.

[2] Ibid.; Gilb. Ten., 21; *Doe* d. *Cook* v. *Danvers*, 7 East, 299; *Bushby* v. *Dixon*, 3 B. & C. 298. But see *Horenden* v. *Annesley*, 2 Sch. & Lef. 624.

[3] R. P. C. 1st Rep., 77.

[4] *Grant* v. *Ellis*, 9 M. & W. 113; *De Beauvoir* v. *Owen*, 5 Ex. 179; *Archbold* v. *Scully*, 9 H. L. 360.

superior, the mesne tenant, it may be a question whether or not the mesne tenant is by efflux of time gradually barred of his rights as immediate reversioner of the undertenant.[1] But it may probably be decided that as the circumstances have arisen by arrangement, and to save the circuity of a double payment,[2] the Statute does not apply.

Can landlord enter till end of lease.

It has been doubted whether the landlord who had allowed a tenant to go twenty years without payment of rent could bring ejectment during the lease, or whether he must wait till by its determination his reversion fall in. In the Irish case of *Doe* d. *Mannion* v. *Bingham*[3] it was held that he must so wait; but this case has not been followed, and cannot now be considered law.[4]

In the case of nominal rents time never runs against landlord.

Where the rent reserved on a lease in writing is nominal, or so small as to seem unimportant, the rightful landlord may, under the general rule as to the rights of reversioners, enter any time within twenty years from the falling in of the lease, and the same is the case where the rent, though higher, has been simply withheld and not paid to a wrongful claimant.[5] In no case, while there is a lease in

[1] *Drew* v. *Earl of Norbury*, 3 Jo. & Lat. 267; *Doe* d. *Newman* v. *Godsil*, cited 4 Q. B. 603, note.

[2] *Hayes* v. *Woodley*, 3 Ir. Ch. Rep. 142, 150.

[3] 3 Ir. L. R. 456.

[4] *Doe* d. *Davy* v. *Oxenham*, 7 M. & W. 131; *Owen* v. *De Beauvoir*, 16 M. & W. 560; *Spratt* v. *Sherlock*, 3 Ir. C. L. R. 69.

[5] *Doe* d. *Davey* v. *Oxenham*, 7 M. & W. 131; *Fulton* v.

writing, can the tenant himself acquire any title.[1] It is to be noticed that under section 34,[2] wherever the landlord's remedy has been lost his title also is extinguished.

Occupation by servants, etc.

As to what is such a permissive occupation as to prevent an occupier acquiring a title against the owner the reader may refer to some remarks in a short treatise by the late Lord St. Leonards.[3] Occupation by a bailiff is such permissive occupation,[4] and by a servant.[5]

No one is obliged to take advantage of a forfeiture.

No one is obliged to take advantage of a forfeiture. This is old law,[6] and is preserved by section 4 of 3 & 4 Wm. 4, c. 27.[7] So that a lessor, like any other remainderman on an estate for years or life, has twenty years within which he may pursue his remedy after the reversion falls *naturally* into possession, notwithstanding any previous right of entry he may have gained by any forfeiture.[8] Where there is a provision for re-entry only on the commission of any act of forfeiture by a tenant,

Creagh, 3 Jo. & Lat. 329; *Chadwick* v. *Broadwood*, 3 Beav. 308.

[1] *Archbold* v. *Scully*, 9 Hol. L. C. 360.

[2] 3 & 4 Wm. 4, c. 27, s. 34, Appendix.

[3] R. P. Stat., p. 26.

[4] Ibid., p. 27.

[5] *Lessee of Ellis* v. *Crawford*, 5 Ir. L. R. 404; *Lessee of Doherty* v. *Doherty*, 5 Ir. L. R. 449; *Lessee of Montmorency* v. *Walsh*, 4 Ir. L. R. 254.

[6] *Doe* d. *Cook* v. *Danvers*, 7 East, 299; *Doe* d. *Allen* v. *Blakeway*, 5 Car. & P. 563.

[7] See Appendix.

[8] See 1 Vesey, Sen., 275; *Doe* d. *Allen* v. *Blakeway*, 5 Car. & P. 563.

the lease is simply voidable, not void, and there can be no question that the lessor is not obliged to take immediate advantage of the forfeiture. But where the penalty for an act of forfeiture is that upon such breach the lease shall absolutely determine and be void, a difficulty has been raised, that by the very terms of the lease the lease must be then considered to have ceased, and the reversion to have fallen in. It is, however, perhaps the better opinion that if that point should be raised, it would be held that a lease with such a provision is void only at the option of the lessor, inasmuch as it is not allowable for a lessee to take advantage of his own wrong-doing.[1]

An acknowledgment in all the preceding cases by the tenant in writing, given to the landlord or his agent, within the statutory period of twenty years,[2] will avoid the Statute, and there is a saving in case of the disability of the lessor at the time of his right of entry.[3]

There is a conflict as to the question of the recovery of arrears between section 42 of 3 & 4 Wm. 4, c. 27,[4] and section 2 of 3 & 4 Wm. 4, c. 42.[5] The latter Act received the royal assent last

[1] *Read* v. *Farr*, 6 M. & S. 121; *Malins* v. *Freeman*, 4 Bing. N. C. 395; *Hyde* v. *Watts*, 12 M. & W. 254; *Hughes* v. *Palmer*, 19 C. B. N. S. 393. And see *Robert* v. *Davey*, 4 B. & Ad. 664, and Smith's L. C., 6th ed., vol. i., 36–39.

[2] 3 & 4 Wm. 4, c. 27, s. 14, and the new Act.

[3] 3 & 4 Wm 4, c. 27, s. 16, and the new Act.

[4] Appendix.

[5] Appendix.

(which is the true test of priority), namely, on the 14th August, 1833, while the former received the royal assent on the 24th of July previous; where, therefore a case comes within the provisions of both Acts the later Act will prevail, and by this it appears, that where there is an indenture of demise and covenant for payment of rent twenty years' rent may be recovered.[1] But where there is no indenture of demise or covenant it seems that six years' arrears of rent can alone be recovered as the case falls solely under the first Act.[2]

[1] *Paget* v. *Foley*, 2 Bing. N. C. 679; *Sims* v. *Thomas*, 12 Ad. & Ell. 536.

[2] *Uppington* v. *Tarrant*, 3 Ir. Ch. R. 262.

CHAPTER XVII.

MORTGAGOR AND MORTGAGEE.

Mortgages.

THE rights which a mortgagor may acquire against his mortgagee by efflux of time and *vice versâ* are governed partly by the special section 28 of the principal Act,[1] and the explanatory Act, 7 Wm. 4 & 1 Vict., c. 28,[2] and partly by more general rules.

Complexity of the subject.

The subject is one of some complexity. A mortgagor is in an anomalous position; "he can be described only by saying he is a mortgagor," *per* Parke, B.[3] We will first consider the ordinary case where a mortgagor in fee remains in possession of the mortgaged property.

Mortgagor remaining in possession.

Where a mortgagor remained (as is usual) in occupation of the mortgaged premises it was doubted till the passing of 7 Wm. 4 & 1 Vict., c. 28, whether the mortgagee would not be barred of his rights against the land, notwithstanding payment of interest or part principal to him in the meantime, at the expiration of twenty years from his right of entry, so that he would be left an unsecured creditor for the

[1] 3 & 4 Wm. 4, c. 27, s. 28, Appendix.

[2] Appendix.

[3] *Litchfield* v. *Ready*, 20 L. J. Ex. 51.

mortgage money, his right to which (though not to the land) could be kept on foot by payment of interest or principal. And it was considered that where there was nothing amounting to a re-demise in the mortgage deed that the twenty years would commence running against the mortgagee at the date of the deed; and at the expiration of the re-demise, where such existed. To make a re-demise in a mortgage deed it is necessary that there be in it an affirmative covenant for enjoyment of the premises by the mortgagor for a definite period; a covenant for such enjoyment until default not being such a re-demise owing to the fact that a demise for an uncertain period is void at law.[1] Now, however, by 7 Wm. 4 & 1 Vict., c. 28, it is provided that time shall not run against a mortgagee so as to bar his right to land (as defined in 3 & 4 Wm. 4, c. 27, s. 1) so long as any part of principal, or interest is paid by mortgagor,[2] but a mortgage of a rent charge or other hereditaments not comprised in the definition of land seems still liable to the same question.

Effect of a re-demise.

What creates a re-demise.

Not important as to "land" since 7 Wm. 4, & 1 Vict. c. 28.

A mortgagee under this Act is protected as against a person who has been in occupation more than twenty years before the action, but less than twenty years before the mortgage, and who has thus gained

[1] As to what is sufficient in a mortgage deed to create a re-demise, see Dav. Prec. Con., vol. ii., pt. 2, p. 588; *Doe* d. *Roylance* v. *Lightfoot*, 8 M. & W. 558; *Doe* d. *Pasley* v. *Day*, 2 Q. B. 147.

[2] Appendix. See *Doe* d. *Jones* v. *Williams*, 5 A. & E. 291.

a title against the mortgagor,[1] and a purchaser taking a conveyance from mortgagor and mortgagee is a person claiming "under the mortgage," and protected by the Act.[2] For further remarks on the bearing of the Act the reader is referred to the case of *Eyre* v. *Walsh*.[3]

Acknowledgment by mortgagor.

The right to recover the money as well as the land is lost by the mortgagee at the end of twenty years after his present right to receive the same, unless there has been some payment of interest or part payment of principal or acknowledgment.[4] For the exact meaning of the expression "a present right to receive," the reader may refer to the case of *Faulkner* v. *Daniel*.[5] There is, however, a difference in the two cases as to the effect of an acknowledgment. In order to keep up the charge on the land, the acknowledgment must be in writing signed by the mortgagor personally, and made to the mortgagee or his agent. In order, however, to keep up the money charge alone, a similar acknowledgment by the agent of the mortgagor will suffice, so that if an acknowledgment has been made, signed by the mortgagor's agent to the mortgagee, he none the less will lose the security of the land, while remaining a specialty creditor for the mortgage money. As to the law upon signatures generally, the reader is re-

[1] *Doe* d. *Palmer* v. *Eyre*, 17 Q. B. 366.

[2] *Doe* d. *Baddeley* v. *Massey*, 17 Q. B. 373.

[3] 10 Ir. C. L. Rep. 346.

[4] 7 Wm. 4 & 1 Vict., c. 28; 3 & 4 Wm. 4, c. 27, s. 14.

[5] 3 Hare, 212.

ferred to the case of *Wain* v. *Warlters*, and the notes and references thereto.[1]

Part payment.

Inasmuch as part payment of interest or principal money secured by a mortgage will prevent the mortgagor from deriving the benefit of the Statute it may be questioned what the effect of such a payment by a stranger would be.

The receipt of the rent and profits of mortgaged premises by an equitable mortgagee has been held equivalent to a part payment within the Statute.[2]

Disabilities of mortgagee.

The disabilities affecting the mortgagee which may give him an extension of time are, as regards his right to the land, those mentioned in 3 & 4 Wm. 4, c. 27, s. 16. Subject to the extreme period of limitation of forty years,[3] and as regards his right to the money as a specialty debt by virtue of the usual covenant, those named in 3 & 4 Wm. 4, c. 42, s. 4. They are practically the same, but as regards the latter, the disability of absence beyond the seas has been abolished by the Mercantile Law Amendment Act.[4] In the first case, moreover, the mortgagee would have only ten years further from the date of recovery from disability, while in the second he has the full twenty years, so that there arises again the not unusual contingency of a creditor, who,

[1] Smith's L. C., vol. ii., 234. And see under Signatures.

[2] *Brocklehurst* v. *Jessop*, 7 Sim. 438.

[3] Reduced to thirty years by the new Act. See Appendix, 37 & 38 Vict., c. 57.

[4] 19 & 20 Vict., c. 27, s. 10.

though he has not lost his debt, has lost his security by efflux of time.[1]

Liability of mortgagee.

The cases where a mortgagee is under disability at the time of the accrual of his right cannot be frequent, as usually he will not be under such at the date of the mortgage, and his rights generally arise shortly afterwards, if not at the time, except under the Statute 7 Wm. 4 & 1 Vict., c. 28, to which it does not appear that the saving in case of disability is applicable. Still a mortgagee would have time to fall under disability so as to prolong his right of entry in the case of a deed which created a re-demise[2] to the mortgagor between the time of the execution of the deed and the termination of such re-demise. And the question may arise under mortgages made to persons under disability, under orders in lunacy, and the like.

Mortgagee in possession.

The case of a mortgagee in possession is now principally regulated by section 28 of the principal Act.[3] Broadly stated the effect of this section is that time begins to run in favour of the mortgagee immediately upon his obtaining possession of the premises, whether land or rent charge, comprised in his mortgage, and that the mortgagor may not bring

[1] The two dates of ten years and twenty years are altered under the new Act. See Appendix.

[2] See *supra*.

[3] 3 & 4 Wm. 4, c. 27, s. 28, Appendix. And after the 1st January, 1879, by the new Act. By this Act the period is reduced from twenty years to twelve years. See Appendix, 37 & 38 Vict., c. 57, s. 7.

any suit to redeem except within twenty years of such possession, unless in the meantime an acknowledgment of his title is given to the mortgagor or his agent signed by the mortgagee or the person claiming through him, but the wording of the clause requires a careful study, and numerous questions have arisen on its effect.

Where property is settled if mortgagee has an interest in the premises.

The rights of a mortgagee are sometimes complicated where the property in question is subject of a settlement. Thus, where the mortgagee was himself entitled to a limited interest in the premises, time did not commence to run in his favour till the determination of that interest.[1]

Where a mortgagee enters not as a mortgagee only, but as purchaser of the equity of redemption, he must look to his vendor's title, and if he has really only acquired a limited interest in such equity of redemption, time will not commence to run in his favour during the continuance of that interest; as while at once mortgagee of the whole and the owner of the immediate equity of redemption he is bound to keep down the interest on his own mortgage in favour of the remaindermen, and there is the same hand to pay and receive the money.[2] The rights of a mort- The rights are

[1] *Raffety* v. *King*, 1 Keen, 601; *Tull* v. *Owen*, 4 Y. & C. 201; *Hyde* v. *Dallaway*, 2 Ha. 528.

[2] Story's Equity Jur. 1028 (*a*); *Raffety* v. *King*, 1 Keen, 601–18; *Corbett* v. *Barker*, 1 Anst. 138; *S. C.*, 3 Anst. 755; *Reeve* v. *Hicks*, 2 Sim. & Stu. 403; *Ravald* v. *Russell*,

not affected by subsequent devise of the equity of redemption.

gagee are not, of course, affected by a devise in settlement of the mortgaged premises subsequent to the mortgage.[1]

Time will not run in favour of the mortgagee, if he from time to time acknowledges the mortgagor's title. The wording of the section regulating the acknowledgment requires particular attention.[2] It must be signed personally by the mortgagee or the person claiming through him, and be made to the mortgagor or person claiming through the mortgagor or the agent of either.

Acknowledgment by mortgagee in possession.

If there is more than one mortgagor, acknowledgment to one is sufficient to save the rights of all. If, on the contrary, there is more than one mortgagee, an acknowledgment by one affects only his interest; and there is a provision for apportioning the value of that interest.

Nature of acknowledgment.

Where an acknowledgment of the mortgagor's title had been made and signed by one only of two trustees it was held to be entirely inoperative.[3] In this case Mellish, L.J., seemed to think that the signature of one out of several mortgagees who had the beneficial interest would be inoperative if they were joint tenants, and that much difficulty might be thereby caused, for example, in the case of partners;

1 Younge, 9–19. And see *per* Chelmsford, L.C., in *Seagram* v. *Knight*, L. R. 2 Ch. 632.

[1] *Browne* v. *Bishop of Cork*, 1 Dr. & Wal. 700; *Raffety* v. *King*, 1 Keen, 601.

[2] 3 & 4 Wm. 4, c. 27, s. 28, Appendix.

[3] *Richardson* v. *Younge*, L. R. 6 Ch. 478; 10 Eq. 297.

but James, L.J., expressly stated that the decision in the case must be considered as strictly confined to mortgagees who are trustees, and appear such on the face of the deed.

A mortgagee may also be held to acknowledge his mortgagor's title by keeping and rendering accounts.[1]

Equitable mortgages.

Where a mortgagee in possession is in possession under an agreement amounting in equity to a lease, time will not run in his favour till the expiration of such equitable lease.[2] It may be remarked that, independently of the lien gained by a mortgagee upon the land by an equitable mortgage by deposit of title deeds, the mortgage debt is a simple contract debt only.[3]

Where a third person is in possession mortgagee has a special statutory protection.

Where a third person is in occupation it does not follow that, because he has acquired a title against the mortgagor, he has also acquired it against the mortgagee, as the latter is specially protected by the Statute 7 Wm. 4 & 1 Vict. Thus where an owner mortgaged land in occupation of a third person, who remained in possession more than twenty years without payment of rent or acknowledgment, yet payment of interest in the meantime by the mortgagor to the mortgagee was held sufficient under

[1] *Baker* v. *Wetton*, 14 Sim. 426; *Hordle* v. *Healey*, 1 Madd. 181; *Richardson* v. *Younge*, L. R. 10 Eq. 297.

[2] *Archbold* v. *Scully*, 9 H. L. 360; *Drummond* v. *Sant*, L. R. Q. B. 763.

[3] *Brocklehurst* v. *Jessop*, 7 Sim. 438.

the Statute to save his rights as against the mortgagee.[1] A question may be raised whether a third person so entitled by possession against the mortgagor, but not against the mortgagee by virtue of the statutory saving is or not entitled to the equity of redemption. A person who has bought the interest of both mortgagee and mortgagor is a person "claiming under the mortgage" within the Act.[2]

Query whether in such case the third person is entitled to the equity of redemption.

Under section 3 of the principal Act,[3] where the estate is a reversion, time will not commence to run in favour of the mortgagor until the reversion falls into possession.[4]

In mortgages of reversion time cannot begin to run till they fall in.

Where a mortgagor devises mortgaged property in settlement there will be no saving in favour of the remaindermen on their reversion falling in.[5]

The rule, that when time has once begun to run, no dealings by way of settlement with the estate will enlarge it, is applied with strictness by section 28 as to mortgagees in possession, as no one claiming through the mortgagor can recover after twenty years' occupation by the mortgagee.

Where, previously to a mortgage, the mortgagor has settled his property, reserving to himself a life-interest, it is conceived that time would not run

[1] *Ford* v. *Ager*, 2 Hurl. & C. 279; 8 L. T. N. S. 546; *Doe* d. *Palmer* v. *Eyre*, 17 Q. B. 366.

[2] *Doe* d. *Baddeley* v. *Massey*, 17 Q. B. 373 and 20 L. J. Q. B. 434.

[3] Appendix.

[4] *Re Lowe*, 30 Beav. 95.

[5] *Browne* v. *Bishop of Cork*, 1 Dr. & Wal. 700.

against the remaindermen in case of occupation by the mortgagee during the subsistence of the life estate of the mortgagor.

There is no special saving for the disability of a mortgagor.[1]

Welch mortgages are effected by a conveyance of property to a mortgagee, coupled with occupation by him on the understanding that he is to pay himself the interest of the money lent by recovering the profits of the land. The land may be redeemed at any time on repayment by the mortgagor of the money lent; and the mortgagee cannot foreclose,[2] though now equity would probably compel an account against the mortgagee.[3] If a mortgagee after repayment of the mortgage debt continues to hold the property twenty years, the mortgagor will, it appears, be barred his right to recover it,[4] and it would seem as if the same would be the case under the recent Statutes, even if the money remained unpaid, if no acknowledgment of the mortgagor's title has been in the meantime made. Any arrangement for securing repayment of a loan by demise, or granting annuities possessing characteristics similar to those above mentioned is considered of the nature of a Welch mortgage.[5] Welsh mortgages.

[1] See under Disability of Mortgagor.

[2] *Talbot* v. *Braddil*, 1 Vern. 395; *Lawley* v. *Hooper*, 3 Atk. 280; *Yates* v. *Hambly*, 2 Atk. 237.

[3] *Fulthrope* v. *Foster*, 1 Vern. 477.

[4] *Fenwick* v. *Reed*, 1 Mer. 115.

[5] *Tenlon* v. *Curtis*, 1 Younge, 616.

Mortgages of leasehold by assignment and demise.

It would seem, in accordance with general principles, that there is an important distinction between the case where a mortgage of leaseholds is made by demise, and where it is made by assignment. In the former case the possession of a mortgagee, who enters into enjoyment of the premises, will never become adverse, so as to allow time to run in his favour against the mortgagors till the expiration of such demise. Where, however, a mortgage of long leaseholds is made by assignment, and the mortgagee enters, time will probably run in his favour against the mortgagor (though not against the original lessor), from the time of such entry. Where, however, after either an assignment or demise, the mortgagor remains in possession (unless he make payment or other acknowledgment), time will probably run in his favour against the mortgagee as his assignee or under-lessee immediately from the date of such assignment or under-lease. An under-lease of the whole residue of a term, or for a longer period, is practically an assignment.[1] A question might arise in such a case, however, if there should be in the deed a covenant for quiet enjoyment by the mortgagor, whether that would not amount to a re-demise to him of the premises, and one which is not invalid through indefiniteness, inasmuch as it could not last

Different effect of the two methods as to Statutes of Limitations.

When mortgagor and mortgagee are respectively in possession.

[1] *Beardman* v. *Wilson*, L. R. 4 C. P. 57. But under special circumstances there may be raised the relationship of landlord and tenant.

longer than the lease, and time be thus prevented running in favour of the mortgagor.

Mortgages of copyhold.

Where, after the usual conditional surrender of a copyhold, the mortgagor continues in possession, it does not seem to follow that the mortgagee's right of entry commences upon the execution of such surrender, and that he will be, therefore, barred his remedy at the expiration of twenty years therefrom, subject to the usual exceptions,[1] inasmuch as the surrenderee cannot maintain an action of ejectment till after he has been admitted;[2] on the other hand it must be remembered that a mortgagee of copyholds may file a bill of foreclosure before admittance.[3] As to how far copyhold tenure may be extinguished by efflux of time the reader is referred to the case of *Walters* v. *Webb*.[4]

Conflict of laws as to mortgage arrears.

Much difficulty has been felt by the Courts in dealing with the subject of arrears of interest on mortgages in foreclosure and redemption suits. The two Acts, c. 27 and c. 42 of 3 & 4 Wm. 4, seem to overlap in the case of those mortgages where there is the usual covenant for payment of the mortgage money and interest. And the subject is scarcely as yet clearly and satisfactorily settled. Some points may, however, be mentioned as guides in the con-

[1] 3 & 4 Wm. 4, c. 27, ss. 1 and 2.

[2] Davidson's Pr., 3rd ed., vol. ii., pt. 2, 666; *Holdfast* v. *Clapham*, 1 T. R. 600.

[3] Ibid.; *Sutton* v. *Stone*, 2 Atk. 101.

[4] L. R. 5 Ch. 531. See also under Copyholds.

sideration of the subject. Firstly, the difficulty arising from the conflict of the Statutes 3 & 4 Wm. 4, c. 27, s. 42, and 3 & 4 Wm. 4, c. 42, owing to the fact that by the former six years' arrears alone are allowed of a charge on land, while the latter allows twenty years' arrears on a specialty, and received the Royal assent last,[1] is to be solved by treating the charge on the land and the specialty debt on the covenant, as completely distinct, and as if made in separate deeds.[2] In this way, in fact, the mortgagee is in the position of a secured creditor for six years' arrears, and of an unsecured creditor for the remainder of the twenty.[3]

How to be solved. Rule 1.

Rule 2. Secondly, it seems that, notwithstanding expressions to the contrary in *Edmunds* v. *Waugh*,[4] and elsewhere, that there is no difference on this point between suits for redemption and for foreclosure.[5]

Rule 3. Thirdly, that in all cases so far as the suit is one to realize the charge on the land, six years' arrears only are allowed, notwithstanding a covenant for payment in the deed.[6]

Rule 4. Fourthly, that wherever the mortgagee would be

[1] See *supra*, *Paget* v. *Foley*, 2 Bing. N. C. 679; *Sims* v. *Thomas*, 12 Ad. & Ell. 536.

[2] *Sinclair* v. *Jackson*, 17 Beav. 413; *Elvy* v. *Norwood*, 5 De G. & S. 240.

[3] Dav. Prec., 3rd ed., vol. ii., pt. 2, 572 n.

[4] L. R. 1 Eq. 418.

[5] *De Viguier* v. *Lee*, 2 Hare, 326, 334; *Sober* v. *Kemp*, 6 Hare, 155, 160; *Sinclair* v. *Jackson*, 17 Beav. 405.

[6] *Bowyer* v. *Woodman*, *Ex parte Clark*, L. R. 3 Eq. 313; *Hughes* v. *Kelly*, 5 Ir. Eq. 286; *Hunter* v. *Nockolds*, 1 Mac. & Gor. 640.

allowed to tack a bond debt to his mortgage, if made by separate deed, he may add the further fourteen years' arrears to his principal.[1]

Fifthly, that where there is a trust term for payment of the mortgage, the full arrears for at least twenty years may be recovered.[2] Rule 5.

With regard to this rule, the case is the same where there is an agreement to assign a term.[3] In *Mason* v. *Broadbent*[4] the question what amounts to such a trust is considered.

Where, however, the covenant does not in terms extend to payment of interest, it would seem that it would not be within the saving as to arrears of the 3 & 4 Wm. 4, c. 42, s. 3. The mortgage debt, where there is no covenant for payment, is one of simple contract only.[5]

But to obtain more than six years' arrears, the question of tacking must be raised on the pleadings,[6] and the right may be lost by laches.[7] Taking must be raised on the pleadings.

In a case where the proceeds of sale of mortgaged premises were paid into Court under a decree for administration of the mortgagee's estate, and there Where proceeds of sale of mortgaged premises is in Court.

[1] *Elvy* v. *Norwood*, 5 De G. & Sm. 240; *Thomas* v. *Thomas*, 22 Beav. 341; *Rolfe* v. *Chester*, 20 Beav. 610; *Coleman* v. *Winch*, 1 P. W. 775.

[2] *Cox* v. *Dolman*, 2 De G. M. & G. 592; *Lewis* v. *Duncombe*, 29 Beav. 175.

[3] *Shaw* v. *Johnson*, 1 Drew. & Sm. 412.

[4] 33 Beav. 296.

[5] *Hodges* v. *Croydon Canal Co.*, 3 Beav. 86.

[6] *Sinclair* v. *Jackson*, 17 Beav. 405.

[7] *Round* v. *Bell*, 30 Beav. 121.

was interest for nearly twenty years in arrear, which exceeded in amount the money in Court, the whole fund was paid out on the petition of the mortgagee's trustees to them, Kindersley, V.-C., being of opinion in effect that the fund was constructively in possession of the mortgagee, and that he would have had a right to retain the whole, though exceeding six years' arrears.[1] The same learned vice-chancellor also took occasion to make observations on *Mason* v. *Broadbent*,[2] where, on a suit by a mortgagor to recover surplus monies arising from a sale of mortgaged premises, the mortgagee was allowed to retain only six years' arrears by Romilly, M.R.; a decision which, however, was appealed against, but compromised by allowing the mortgagee a third of the further sum he claimed.[3]

In a recent case, where the purchase money of premises which were subject to an equitable mortgage, and had been taken under compulsory powers, had been paid into Court by a corporation, it was held, upon a petition, that the mortgagee was only entitled to six years' arrears of interest, the Court holding that the petition was a proceeding analogous to a suit, and that the petitioners were in the same position as if they had commenced such a suit.

Judgment creditors.

Judgment creditors are within the operation of 3 & 4 Wm. 4, c. 27, s. 42, but not of 3 & 4 Wm. 4,

[1] *Edmunds* v. *Waugh*, 1 Eq. 418; and see *In re Stead*, L. R. 2 Ch. D. 717.

[2] 33 Beav. 296.

[3] Ibid., final note.

c. 42, s. 3, so that their rights are limited to six years' arrears of interest; they are, in fact, on the same footing as a mortgagee without a covenant for payment in his mortgage.[1]

Tacking.

The rule of tacking, whereby a mortgagee may tack a bond debt to his mortgage money, is established simply to prevent circuity of action.[2] A mortgagee cannot tack against the mortgagor himself, even where the bond debt and the mortgage debt are in respect of the same sum.[3] But a mortgagee may tack against the heir, executor, or beneficial devisee of his mortgagor, but not against the assignee of such heir, executor, or devisee, respectively; and he may not tack as against other prior specialty creditors.[4] The case of *Round* v. *Bell*, decided by Romilly, M.R., seems inconsistent with the entire right of mortgagees to tack against beneficial devisees of a mortgagor,[5] and apparently on grounds which would prevent tacking altogether. In the recent case of *In re Stead's Mortgaged Estates*,[6] where money was paid into Court under the Lands Clauses Act for purchase of land, which was subject to an equitable mortgage by deposit, with a memorandum undertaking to give a

[1] *Henry* v. *Smith*, 2 Dru. & War. 381; *Greenway* v. *Bloomfield*, 9 Hare, 201.

[2] Coote on Mortgages, 3rd ed., 392.

[3] See, however, Ibid., 393; and *Du Viguier* v. *Lee*, *ubi supra*.

[4] Coote on Mortgages, 3rd ed., 393, and cases there cited.

[5] 30 Beavan, 121.

[6] L. R. 2 Ch. D. 713.

legal mortgage on petition by the mortgagee for payment, it was held that the analogy of the Statutes of Limitations applied, and that only six years' arrears of interest could be charged.

A security by way of a trust for sale is regarded as an ordinary mortgage, in reference to the Statutes of Limitations,[1] even though made to a third person.[2]

Where a mortgagee of a life interest entered into possession under an order of the Court, he was not considered to become a trespasser on the death of the life tenant as against the persons interested in remainder, and consequently he was bound to account for rents received for the whole time elapsed since the death of the mortgagor.[3]

[1] *Locking* v. *Parker*, L. R, 8 Ch. 30; *Yardley* v. *Holland*. L. R. 20 Eq. 428; *Kirkwood* v. *Thompson*, 2 H. & M. 392.

[2] *Locking* v. *Parker*, *ubi supra*.

[3] *Hickman* v. *Upsall*, L. R. 2 Ch. D. 617.

CHAPTER XVIII.

ACKNOWLEDGMENTS AND DISABILITIES IN MORTGAGES.

3 & 4 Wm. 4, c. 27, s. 28. Acknowledgment by mortgagee in possession.

WHERE a mortgagee enters into possession of mortgaged premises there is, by section 28 of 3 & 4 Wm. 4, c. 27, an express saving of the mortgagor's title in the case of acknowledgment by the mortgagee. This must be signed and in writing, and given to the mortgagor or his agent. The words of the section are as follows:—"When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee, or the person claiming through him; and in such case no suit shall be brought but within twenty years next after

the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; and where such of the mortgagees, or persons aforesaid, as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors

shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage."

The acknowledgment must be given to the mortgagor, or his agent, therefore even a recital in a deed upon a transfer to a third person, that the mortgage is still subsisting, and that the conveyance is subject to the equity of redemption, is insufficient.[1]

Acknowledgment by joint mortgagee.

A curious question arose on this section in *Richardson* v. *Younge*,[2] on appeal before the Lords Justices from the Vice-Chancellor Malins. The question was as to the effect of an acknowledgment by one of two joint mortgagees, who were, however, trustees, and had, therefore, no several and apportionable interest in the premises. Three views were suggested in the argument. First, that an acknowledgment by one bound both; secondly, that it bound one-half of the property, and enabled the plaintiff to redeem one-half on payment of one-half the debt; and, thirdly, that the acknowledgment by one was ineffectual altogether. This last view, which was in accordance with that of the vice-chancellor, was adopted by the Court, but it was expressly stated by James, L.J., that the decision

[1] *Lucas* v. *Dennison*, 13 Sim. 584.

[2] L. R. 6 Ch. 478.

was confined to the case of mortgagees who are trustees, and are shown to be such on the face of the deed.

Sir W. James, L.J., in giving judgment in this case, remarks as follows:—"It appears to me to be the best construction of this involved and difficult section to hold that the provisions as to acknowledgment by some of several trustees apply only where they have separate interests, either in the money or the land. I do not think that Mr. Wilson (the acknowledging mortgagee) had any separate interest either in the money or the land. He was simply joint-tenant with his co-trustee of the land, and jointly entitled with him to the mortgage money. Had the mortgagees not been trustees, the case would have stood very differently, for they must, almost of necessity, have been entitled to some distinct interests in the mortgage money; and if they had been partners difficult questions might have arisen, but in the present case, which is simply that of trustees, I agree with the conclusion of the Vice-Chancellor." [1]

Terms of acknowledgment.

Where a mortgagee is in possession, a sufficient acknowledgment of the mortgagor's right to redeem may be implied from correspondence signed by the mortgagee and sent to the mortgagor or his agent, in which he states his willingness to give an account to the mortgagor.[2] The question as to what con-

[1] L. R. 6 Ch. 481.

[2] *Richardson* v. *Younge*, L. R. 10 Eq. 275; *Hodle* v. *Healey*, Madd. & Geld. 181; *Trulock*

stitutes a sufficient acknowledgment, however, will often be one of difficulty; and we have the authority of Romilly, M.R., for saying that the authorities on the subject are various and difficult to reconcile.[1] In the case of *Thompson* v. *Bowyer*,[2] it is laid down by Lord Romilly that it is a misapprehension to say that all that is required is an admission that the defendant holds under a mortgage title. A person, he suggests, may say, "I held originally under a mortgage title, but I am not a mortgagee now; I am entitled to the fee simple of the estate." What is required is not an admission that the defendant holds under a mortgage title, but an admission that some person has a right to redeem him.

In *Thompson* v. *Bowyer*, a mortgagee, after being in possession more than twenty years without account or acknowledgment, wrote to the solicitor of his mortgagor as follows:—"I have received yours of the 2nd inst. I do not see the use of meeting either here or at M——, unless some one is ready with the money to pay me off." The Master of the Rolls held this letter a sufficient admission of the plaintiff's right to redeem, following a case of *Trulock* v. *Robey*,[3] of a very similar character.

An acknowledgment of the title of the mortgagor, even after the expiration of twenty years, has been held sufficient to restore it.[4] And so also in a case

v. *Robey*, 12 Sim. 402; *Stansfield* v. *Hobson*, 16 Beav. 236.

[1] *Thompson* v. *Bowyer*, 9 Jur. N. S. 863; 9 L. T. R. 12.

[2] *Ubi supra.*

[3] 12 Sim. 402.

[4] *Stanfield* v. *Hobson*, 16 Beav. 236.

where the acknowledgment was made by a devisee as tenant in tail of a mortgagee in possession more than twenty years.[1]

Acknowledgment by mortgagee in possession.

There is not in the Act (3 & 4 Wm. 4, c. 27) any special provision for the case of acknowledgment by a *mortgagor* in possession. Indeed it was, as we have seen, at one time doubted whether time might not run in favour of the mortgagor and against the mortgagee, notwithstanding punctual payment by the former of the interest accruing on the mortgage debt.[2] This was, as is above mentioned, remedied by the Act 7 Wm. 4 & 1 Vict., c. 28, by which in effect payment of interest on or any part of the principal of the mortgage debt is to be considered as a sufficient acknowledgment from time to time of the title of the mortgagee to the mortgaged land. So long, therefore, no further acknowledgment is required from the mortgagor; but should he cease to pay interest and still remain in possession he will usually commence to acquire a title against his mortgagee,[3] unless this is prevented by acknowledgment under section 14 of 3 & 4 Wm. 4, c. 27, which is sufficient in a case where no special relation exists.[4]

Disability of mortgagor.

Lord St. Leonards, in his work on the Real Property Statutes, has expressly observed that there is no saving for disabilities on the part of a mort-

[1] *Pendleton* v. *Rooth*, 1 Giff. 35.

[2] *Supra*, p. 150.

[3] See *supra*, under Owner and Trespasser.

[4] See Ibid.

gagor or his heirs as to the bar created by the Statute.[1] With the greatest deference to so high an authority it may be remarked that the correctness of this observation is now perhaps doubtful. And inasmuch as a redemption suit appears equally with a foreclosure suit to be a suit for the recovery of land within section 24 of the Act, which places suits in equity on the same footing with actions at law, it seems to follow that all the savings which are allowed in favour of other plaintiffs will (so far as applicable) be allowed a mortgagor plaintiff in a redemption suit. And it may be noticed that, according to the old law, a mortgagor had benefit of disability.

Disability of mortgagor.

Thus, in an old case long previous to the existing Statutes, it was considered that a redemption suit (which would otherwise have been barred) would be allowed in case of excuse by reason of imprisonment, infancy, or coverture, or absence beyond seas; although otherwise in the absence of excuses the right to redemption would be barred in the same time as an ordinary right to bring ejectment.[2] And the same rule was laid down by Lord Talbot in a case of *Belch* v. *Harvey*.[3]

Successive disabilities.

Much doubt had been felt as to the effect of the occurrence of successive disabilities in the same person, it being argued on the one hand that, under

[1] Lord St. Leonards, R. P. S., chap. i., s. 6, p. 45.

[2] *Jenner* v. *Tracey*, quoted at *Cook* v. *Arnham*, 3 P. W. 287 n. (*b*). Quoted Ibid.

the wording of the 16th section, no disabilities were protected, except such as existed at the time when the title first accrued; and on the other, that by the section, especially when read in the light of the 17th and following sections, time would not run against a plaintiff until the expiration of the last of two or more successive disabilities. The question has now been set at rest by the recent case of *Borrows* v. *Ellison*,[1] in which it is decided that, if no break occurs, but the causes of disability overlap, the disability is continuous, notwithstanding that there may be more causes than one. In the case in question, the lady, who was plaintiff, being then an infant, became entitled to land in 1833, which the defendant then entered upon and occupied till the time of the action being brought in 1870. The plaintiff subsequently, while still an infant, married, and in an action by herself and her husband to recover the land, it was held that the action was maintainable, notwithstanding that more than twenty years had elapsed since the title accrued, and more than ten years since the removal of the disability of infancy.

[1] L. R. 6 Ex. 128.

CHAPTER XIX.

SPECIALTIES.

All actions upon specialties must now by virtue of the Act 3 & 4 Wm. 4, c. 42, be brought within a period of twenty years. The third section of that Statute enacts as follows:—"That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognisance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any Statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon any indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognisance, within ten years after the end of this present session or within twenty years after the cause of such actions

or suits, but not after; the said actions by the party grieved one year after this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any Statute where the time for bringing such action is or shall be by any Statute specially limited."

There is often a question as to covenants of a more or less continuous nature, such as covenants for title and quiet enjoyment, as to how far they are within the Statute. In *Spoor* v. *Green*,[1] the question was considered at some length by Kelly, C.B., and his observations are quoted here, as they may be of general use.[2] They were as follows:—"There is a distinction between the covenant for title and the covenant for quiet enjoyment. The covenant for title is broken by the existence of an adverse title in another as in this case by the lease, its mere existence rendering the land of less value. The covenant for quiet enjoyment is broken only when the covenantee is disturbed as in this case by the entry into the mine and the taking the fragments of coal in 1848. The deed of purchase having conveyed to

[1] L. R. 9 Ex. 99.

[2] Ibid., 116. It should be observed, however, that the judgment of the majority of the Court in the case was different from that of the Chief Baron, but principally upon different grounds. The facts of the case sufficiently appear from the judgment.

Jamieson, and afterwards to the plaintiff, the mines under the land, as well as the surface, the covenant of the defendant was that he had good title to the mines. That covenant, I think, was broken as soon as it was made, by reason of his having before become party to a lease of the mines, which lease was then in force. It was a covenant running with the land and a continuing covenant, and a breach of it by means of the lease was a continuing breach; and although the plaintiff might have sued upon it upon his becoming possessed and might have recovered the damages he had sustained (if any) by reason of the breach he was not bound to do so; and I am of opinion that he continued entitled to sue for any damage afterwards sustained whenever any such should have resulted from the breach; and finally, that if the Statute of Limitations apply at all to covenants for title, the time of limitation does not necessarily begin to run from the making of the covenant, or of a lease which is a breach of the covenant, and that it is no bar as long as the lease continues, and any damage nominal or substantial is or may be sustained. I do not understand it to be questioned that the conveyance passed the mines as well as the land to the plaintiff, nor that a covenant for title runs with the land, nor therefore that the plaintiff is entitled to the benefit of this covenant, nor that it was broken by the making of the lease. And I am of opinion that he is entitled to sue upon it now upon the ground that the existence of the

lease until it expired in 1865 was an incumbrance upon the land and rendered it of less value than if it had not existed; and further, that it made the entry of the lessees lawful, and so enabled them to take the fire-clay from the mine, and although they themselves and not the defendant are liable to the plaintiff for the value of the fire-clay taken, it is a damage to the plaintiff that he is put to his action against them and may incur extra costs in such action which he could not have been exposed to but for the right of entry conferred upon them by the defendant. I am also of opinion that the entry into the mine, and the taking the fragments of coal in 1848 by virtue of the lease which was within the twenty years was a breach of the covenant for quiet enjoyment.

"The case of *Kingdon* v. *Nottle*,[1] upon a covenant for title, and *King* v. *Jones*,[2] upon a covenant for further assurance, are authorities to show that these covenants are continuing covenants and the breaches of them continuing breaches, and that a right of action accrues *toties quoties* when and as often as damage actually arises from the breach of either covenant. *Kingdon* v. *Nottle* was the case of a mortgage in fee, and the mortgagor covenanted with the mortgagee and his heirs and assigns that he had good title to convey and was seized in fee. The mortgagee held during his life and brought no

[1] 1 M. & S. 355; 4 M. & S. 53. See also *Bonomi* v. *Backhouse*, 9 H. L. C. 503; E. B. & E. 654; L. J. Q. B. 378.

[2] 5 Taunt. 418; 4 M. & S. 188.

action; after his death his executrix sued upon the covenant for title and the further covenant for further assurance assigning for breaches that defendant had no title, and that plaintiff requested him to levy a fine, which he refused. She failed on the ground that the covenant ran with the land, and had passed to the devisee of the covenantee. But in the following year the second case was decided in an action brought by the same person as devisee of the original covenantee suing as assignee of the covenant, and assigning for breach that the defendant had no title, and for damage that the lands were of less value than if there had been a good title, and that she had been prevented from selling them for so large a price as she would otherwise have obtained. There it was argued that the breach having been in the testator's lifetime it could not be assigned; that the covenant might pass with the land, but not so the breach for which the testator and he alone could sue. But it was held that there was a breach also in the time of the devisee which gave her a right of action upon which she was entitled to sue: Lord Ellenborough observing, 'The covenant passes with the land to the devisee and has been broken in the lifetime of the devisee; for so long as the defendant has not a good title there is a continuing breach; and it is not like a covenant to do an act of solitary performance which not being done the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties* as the exigency of

the case may require.' Here then the damage that the plaintiff was unable to sell at as large a price as she would have obtained if the title had been good, was held to constitute a continuing substantive cause of action, and if the action had been brought at a long subsequent period, and the Statute of Limitations had been pleaded, the time could not have run from any earlier period than the accruing of that action.

"And so in *King* v. *Jones*,[1] where the covenant was for further assurance, the covenantee in his lifetime called upon the covenantor to levy a fine and afterwards died, and the plaintiff his heir to whom the covenant had passed as assignee entered upon the premises and was possessed, and was afterwards evicted and brought his action, it was objected that the breach was in the lifetime of the original covenantee, and that he alone was entitled to sue, and that if any action lay after his death it must be by his executors, as the damages belonged to his estate. But, after an elaborate argument and time taken to consider, it was held by the Court of Common Pleas that the action well lay and that the refusal to levy a fine (the further assurance required) was a breach and a damage to him; that 'the ancestor (the original covenantee) had required the defendant to perform his covenant, but gave him time and did not sue him instantaneously for his neglect, but waited for the event. It was wise in him so to do until the ultimate damage was sustained, for other-

[1] 5 Taunt. 418; 4 M. & S. 188.

wise he could not have recovered the whole value; the ultimate damage then not having been sustained in the time of the ancestor, the action remained to the heir, who represents the ancestor as to the land, as the executor in respect of personalty.' These decisions show that it is the resulting damage and not merely the breach of covenant which gives the right of action.

"It is true when these cases were decided there was no Statute of Limitation expressly taking away the right to sue upon a covenant after a certain number of years from the breach. But the language of the Statute is that no action shall be brought but within twenty years after the action has accrued; and we have only to consider the real nature of the covenant for title, and of the various kinds of breaches of it, which may be committed, to see that the Statute of Limitations is wholly inapplicable to such breaches, except where the right of action is upon an eviction of the whole property conveyed, so that there is no land with which the covenant may run and nothing left upon which the covenant can operate.

"In such a case the Statute may apply and from such an eviction the time may begin to run. But, in the cases cited as here, the breach being the grant and continued existence of a lease of a part of the property only, as of the mines and minerals under the land, how can the Statute apply? The mine may never be worked at all, so that no damage may ever be sustained; and if an action be brought on

the grant of the lease only nominal damages may be recovered. But the lease may be for forty years; a quantity of minerals may be taken at the end of ten years, a number of houses on the surface subverted and destroyed in twenty years, and a mansion injured in thirty years.

"If these be not separate and substantive causes of action, upon each of which the complainant has at least twenty years to sue, of what use is the covenant in such a case? But suppose another case: covenant for title in a conveyance in fee of a landed estate. It turns out that the covenantor a year or two before has sold and conveyed the reversion of one-half of the property at his death to A. B., provided A. B. is then living. The covenantor lives for twenty years and then dies, and A. B. survives him and enters. Upon these facts I apprehend it is not to be doubted that the covenant is broken as soon as it is made; for if the purchaser, the covenantee, were minded to sell the property, or he became bankrupt, and it was of necessity to be sold, it would sell for much less than if there were an indefeasible title in fee simple. But supposing no action to be brought until the death of the covenantor and the entry of A. B., can it be contended that the Statute of Limitations would be a bar? If it be, and the covenantee was ignorant of the conveyance until the death of the covenantor he loses half his land and has no remedy. And if he hears of it and sues within the twenty years, but in the covenantor's

lifetime, how can the jury estimate the damages in the uncertainty whether the covenantor may not survive A. B., and so that the covenantee will never be disturbed in his title?

"I apprehend therefore that upon these grounds and upon all the authorities the lease in question was a continuing breach of covenant, and that the plaintiff was entitled to his action at any time within twenty years of any damage, whether nominal or substantial, being sustained by entry into the mine or otherwise, as long as the lease was in force and consequently from the entry into the mine in 1848, and the taking of the fragments of coal; and further, that the action lies by reason of the mere existence of the lease which, as conferring a right to enter the mine and upon the surface, affected more or less the value of the property until it expired by effluxion of time in 1865. I think, therefore, that judgment should be entered for the plaintiff with nominal damages."

Some of the cases which fall less obviously under the head of specialties have been enumerated above.[1]

Previously to this Statute a specialty debt was presumed to have been paid at the end of twenty years, and this is still so in America.[2] And it seems that even in England, if the Statute, through some defect in pleading, cannot be taken advantage of, yet the fact of payment may still be presumed.[3]

[1] See under Simple Contracts.

[2] Angell, Lim., 5th ed., p. 88.

[3] Ibid., and Best on Presumptions, 188.

Acknowledgments.

The Act 3 & 4 Wm. 4, c. 42, which deals with specialties, contains a saving in the case of acknowledgment in the fifth section. The character of this acknowledgment differs from that required in cases of simple contract under the Act of James the First, inasmuch as it need not amount to a promise to pay, and again from that of the acknowledgment required by the Act of 3 & 4 Wm. 4, c. 27, inasmuch as it is not necessary that it should be made to the person claiming.[1] The terms of the section, so far as they affect this question, are as follows:—"Provided always, that if any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture specially, or recognisance, or his agent, or by part payment, or part satisfaction, on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their actions for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid."

Need not to be made to claimant.

The question whether it is necessary that an acknowledgment, to be sufficient under this section, should be given to some person claiming the sum in question was first raised before the Vice-Chancellor Kindersley in the case of *Moodie* v. *Bannister*.[2]

[1] *Moodie* v. *Bannister*, 4 Drew. 432.

[2] 4 Drew. 432.

According to the Vice-Chancellor, the principle on which the Courts acted previously to the Statute we are now considering was this. There was then no Statute which prevented a bond creditor coming and claiming his debt at any time, but the Courts of Law, and the Courts of Equity following them, held the doctrine of presumption, that after a certain lapse of time payment must be presumed, and when an action was brought on a bond or other specialty, what the Courts of Law did with respect to a defence founded on a lapse of time was, that after twenty years the judge would direct a jury to presume payment. Of course that presumption, like any other, was capable of being rebutted by evidence, and the Court held that evidence of an acknowledgment would be sufficient to rebut the presumption. In fact, it was impossible for a debtor against whom an action was brought to ask the Court to pronounce that the debt had been paid, when he had himself acknowledged the existence of the debt. It appears, therefore, to be a correct statement that, in the case of a specialty debt, the Court could receive in evidence any acknowledgment of the alleged debtor in any shape, even when that acknowledgment was made to a third person, and that it was not necessary that such acknowledgment should amount to a new cause of action. So the matter stood till the passing of the Act with reference to real property, and in that same year the Act now in consideration was passed. In the

Real Property Statute, which is in *pari materia*, the Legislature has provided that an acknowledgment, to be sufficient to prevent the bar of the Statute, must be made to a particular person, and the omission of such a provision in the Act now in question shows, therefore, that such a restriction as to the mode of acknowledgment was not intended as to the cases within the latter Act.

May be made by a trustee.

Payment of interest on a charge by a trustee is sufficient to prevent time running in favour of a beneficial devisee. An executor in respect of the personalty, a devisee of estates devised for payment of debts in respect of such estates, and a beneficial devisee of realty all come within the term "party liable," within the meaning of the 5th section of the 3 & 4 Wm. 4, c. 42, and a payment or acknowledgment by any one of them is a payment by the party liable by virtue of the specialty.[1]

Amount need not be stated.

Considerable latitude in the form of acknowledgment is to be allowed. All that the Act requires is that *some* acknowledgment of the right to the sum claimed shall have been given in writing signed by the person who represents the estate or his agent, and consequently it is not necessary that the acknowledgment should state the amount of the sum alleged to be due. If it refers to the thing in question it is sufficient.[2]

[1] *Coope* v. *Cresswell*, L. R. 2 Eq. 106.

[2] *Per* Shadwell, V.-C., in *St. John* (*Lord*) v. *Boughton*, 9 Sim. 219.

CHAPTER XX.

TRUSTS.

General rules as to trusts.

It is a well-known principle, both as to personalty and realty, and in the case of real property, one confirmed by Statute, that time does not create a bar in case of trust. There are, however, many ways in which the term trust is used, and the doctrine requires some qualification. Thus it is said that a trust, to be within the saving of this principle, must be, in the first place, direct or express, and secondly, of a nature not cognisable at law but solely in equity. There is too a third qualification of the doctrine, viz., that it applies (at all events in its universality) only between the trustee and his *cestui que trust*.[1] As a fact, indeed, every case of deposit or bailment in a certain way creates a trust; but the trusts excluded from the operation of efflux of time are those technical and continuing trusts, which were not cognisable at common law,[2] and where the plaintiff has no legal title, the estate at law being in the trustee.[3]

[1] Angell, Lim., c. 16; Story, Eq. Jur. 1520, n. (1); *A.-G.* v. *Fishmongers' Co.* (Preston's will), 5 M. & Cr. 16; *Wedderburn* v. *Wedderburn*, 4 My. & Cr. 41; *Bridgman* v. *Gill*, 24 Beav. 302.

[2] *Lockey* v. *Lockey*, Prec. Ch. 518.

[3] *Lawly* v. *Lawly*, 9 Mod.

Repudiation by trustee.

A trustee, however, who distinctly and openly repudiates his trusteeship and assumes to own absolutely may commence to acquire an adverse possession against his *cestui que trust*.[1]

The Code Napoléon.

A corresponding exception in the case of trusts finds a place in the French Code, the exception being perhaps of more universal application than with us. Some sections of the Civil Code referring to the questions are subjoined.[2]

Real property governed by 3 & 4 Wm. 4, c. 27, s. 25, where there is an express trust.

The case of real property[3] held in trust is now provided for by section 25 of 3 & 4 Wm. 4, c. 27, by which time does not commence to run against a *cestui que trust*, where there is an express trust, till the trust premises have been sold to a purchaser for

Rep. 32. See, however, criticism by Lord Eldon on this case in *Cholmondeley* v. *Clinton*, 1 Jac. & Walk. 171.

[1] Angell, Lim., 5th ed., p. 165.

[2] "Ceux qui possèdent pour autrui ne prescrivent jamais par quelque laps de temps que ce soit." Code Civil., s. 2236. "Ainsi le fermier, le dépositaire l'usufruitier et tous autres qui détiennent précairement la chose du propriétaire ne peuvent la prescrire." Ibid. "Les héritiers de ceux qui tenaient la chose à quelqu'un de titres désignés par l'article précédent ne peuvent non plus prescrire." Ibid., s. 2237. "Néanmoins les personnes énoncées dans les articles 2236, 2237, peuvent prescrire si le titre de leur possession se trouve interverti soit par une cause venant d'un tiers soit par la contradiction qu'elles ont opposée au droit du propriétaire." Ibid., s. 2238. "Ceux à que les fermiers dépositaires et autres détenteurs précaires ont transmis la chose par un titre translatif de propriété peuvent la prescrire." Ibid., s. 2239.

[3] *i. e.*, land and rent as defined in s. 1 of the same Statute.

value, and then only as against such purchaser.[1] The first question that arises on this section is what is an express trust?

What is an express trust.

An express trust must be actually expressed in terms by deed, will or other writing, and in such way as to vest the legal estate in the trustees. "To create an express trust," says Lord Westbury, "two things must combine, there must be a trustee with an express trust and an estate or interest vested in the trustee."[2]

Requisites of an express trust.

A difficult question arose on the construction of 3 & 4 Wm. 4, c. 27, as to whether section 25, by which the saving in favour of express trusts is created, extends to the subjects dealt with in sections 40 and 42 of the Act, namely to money charges on land or rent. It was at one time held otherwise in Ireland,[3] but this view was not upheld by the House of Lords,[4] and it is now established that when land or rent is vested in trustees upon express trust to raise legacies, annuities, or other charges, time will not run as between trustee and *cestui que trust*, as to any part of the principal or interest of such charges;[5] at all events as long as the land remains in specie.[6]

Charges on land.

[1] See Appendix.

[2] *Dickenson* v. *Teasdale*, 1 D. G. J. & Sm. 52.

[3] *Knox* v. *Kelly*, 6 Ir. Eq. R. 279; *Burne* v. *Robinson*, 1 Dru. & Walsh, 683.

[4] *Burrowes* v. *Gore*, 6 H. L. 907.

[5] *Ward* v. *Arch.*, 12 Sim. 472; *Young* v. *Lord Waterpark*, 13 Sim. 204, 10 Jur. 1, and 15

[6] *Mutlow* v. *Bigg*, *ubi sup.* The decision in this case was

Time runs in favour of a purchaser for value.

Though time in cases of express trust will never run against the *cestui que trust* in favour of the trustee, yet it will in the case of real property, as we have seen, run in favour of a purchaser for value fron the date of his purchase.[1]

Even with notice.

When time begins to run.

And this will be so even though the purchaser has notice of the trust in cases falling within the words of the Statute.[2] The actual date of the execution of the conveyances is usually the date from which time commences to run in favour of the purchaser.[3]

Purchaser under a settlement.

The term purchaser for value includes a person taking under a settlement where there is a consideration; thus, if a trustee on his marriage includes his *cestui que trusts'* property in his marriage settlement, it appears that this is a conveyance for valuable consideration, so far as the consideration extends.[4]

Where existence of the trusts is in dispute.

The saving as to trusts, however, only exists where the trust is clear. Where there is a *bonâ fide* doubt as to the existence of the trust, neither the rule nor the reason of the exception exists. "In

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L. J. Ch. 63; *Cox* v. *Dolman*, 2 D. G. M. & G. 592; *Codrington* v. *Foley*, 6 Vesey, 364; *Lawton* v. *Ford*, L. R. 2 Eq. 104; *Mutlow* v. *Bigg*, L. R. 18 Eq. 246.

reserved on appeal, but on different grounds; L. R. 1 C. D. 385. And see *Pawsey* v. *Barnes*, 20 L. J. Ch. 393.

[1] 3 & 4 Wm. 4, cap. 27, s. 25.

[2] *Law* v. *Bagwell*, 4 Dru. & Wa. 398; *Townsend* v. *Townsend*, 1 Br. C. C. 557.

[3] *A.-G.* v. *Flint*, 4 Hare, 147.

[4] *Petre* v. *Petre*, 1 Drew. 371.

question of doubt," says Lord Cottenham, " whether any trust exists, and whether those in possession are not entitled for their own benefit, the principles of justice and the interests of mankind require that the utmost regard should be paid to the length of time during which there has been enjoyment inconsistent with the existence of the supposed trust.[1]

Co-cestui que trust.

The saving as to express trusts applies between *co-cestuis que trustent* as well as between trustee and *cestui que trust*.[2]

Where one *cestui que trust* had been overpaid he was held liable to account to a *co-cestui que trust* more than six years afterwards.[3]

A mere power is not a trust.

A mere power in gross to sell does not confer any estate in the trustee, which is one of the requisites, as we have seen, to create an express trust.[4] There is a clear distinction between an authority and an estate,[5] and therefore an executor with power to sell real estate charged with debts is not a trustee within the saving of the Statute.[6]

The liability of

The liability of a trustee for a breach of trust,

[1] *A.-G.* v. *Fishmongers' Co.*, 5 My. & Cr. 16.

[2] *Per* Turner, L.J., *dissentiente*, Knight-Bruce, L.J., in *Knight* v. *Bowyer*, 2 D. G. & J. 421, 4 Jur. N. S. 569, 28 L. J. Ch. 54. See *Ward* v. *Arch*, 12 Sim. 472; *Young* v. *Lord Waterpark*, 13 Sim. 199; *Cox* v. *Dolman*, 2 D. G. M. & G. 592; *Garrard* v. *Tuck*, 8 C. B. 231.

[3] *Harris* v. *Harris*, 29 (No. 2) Beav. 110.

[4] *Supra*, p. 189.

[5] *Per* Lord Westbury, in *Dickenson* v. *Teasdale*, 14 D. G. J. & S. 52.

[6] Ibid.; but see *Jacquet* v. *Jacquet*, 27 Beav. 332.

a trustee for a breach of trust creates a trust debt.

though it creates only a simple contract debt, except when the trust is created by a specialty against his estate, is nevertheless a trust debt, and neither the trustee nor his executor can plead the Statute with regard to it. This has been decided in the case of *Brittlebank* v. *Goodwin*,[1] though in several previous cases in Ireland it had been held that though time never ran in favour of the trustee in his lifetime, it would on his death run in favour of his executor.[2] In *Brittlebank* v. *Goodwin*, Giffard, Vice-Chancellor, however, decided to the contrary, in opposition to the Irish authorities, and following the dicta of several distinguished English judges, namely, of Shadwell, Vice-Chancellor, in *Baker* v. *Martin*;[3] of Wood, then Vice-Chancellor, in *Story* v. *Gape*;[4] and of Turner, Lord Justice, in *Obee* v. *Bishop*.[5] In future, therefore, a trustee and his executor or administrator will stand on the same footing as regards the Statutes of Limitation in cases of breach of trust. The Court has refused relief, however, in cases of great delay, against a trustee for a breach of trust for non-payment of surplus rents.[6]

Covenant to settle.

A covenant to settle a sum on trusts creates simply a specialty debt, but a settlor may so act as

[1] L. R. 5 Eq. 545.

[2] *Dunne* v. *Doran*, 13 Ir. Eq. Rep. 545; *Bructon* v. *Hutchinson*, 2 Ir. Ch. Rep. 648, and 3 Ir. Ch. Rep. 361; *Adair* v. *Shaw*, 1 Sch. & Lef. 243.

[3] 5 Sim. 380.

[4] 2 Jur. N. S. 706.

[5] 1 D. F. & J. 137, 141.

[6] *Bright* v. *Legerton* (No. 1), 29 Beav. 60.

to constitute himself an express trustee of such a sum, even though it has never been paid. A settlor in a settlement which contained a recital that a sum had been paid to a trustee by the settlor, and a covenant by that trustee to invest the same in the joint names of himself and the settlor, was held a trustee, for the purpose of the Statutes of Limitation, of the sum, although it had, in fact, never been paid over to the first trustee. The settlor had in the same settlement covenanted to pay to the trustee a further sum, to be held on the same trusts, but it was held that this was simply a specialty debt, not a trust.[1]

Where cestui que trust is in possession.

Where a *cestui que trust* of real property is allowed to be in possession he stands in the legal relation of tenant at will to his trustee.[2] The case of a *cestui que trust* does not seem to be within the wording of 3 & 4 Wm. 4, c. 27. It requires a very technical reading of the 3rd section of that Statute to hold a *cestui que trust* within its provisions, as a *cestui que trust* is really "a person entitled under such instrument" in the words of the section.[3] Moreover, the case of a *cestui que trust* is specially excluded from the provisions respecting tenants at will in section 7 of the same Act. *Cestuis que trustent* are certainly not within the spirit of the Act, which is thus described in

[1] *Stone* v. *Stone*, L. R. 5 Ch. 80.

74.

[2] *Freeman* v. *Barnes*, 1 Vent.

[3] Appendix.

Garrard v. *Tuck*. "The object of the Statute was to settle the rights of persons adversely litigating, not to deal with cases of trustee and *cestui que trust* where there is but one simple interest, *i. e.*, of the person beneficially entitled." [1]

Where cestui que trust is in possession.

Ordinarily, therefore, it would seem that on a reasonable construction of the Statutes affecting the point no lapse of time will give a *cestui que trust* in possession a title against his trustee, and this view seems supported so far as they go by the cases on the subject.[2] There are, however, two qualifications to this rule. In the first place it applies only to cases where the *cestui que trust* is the actual occupant himself, and not to cases where his assignees or others are in possession, who, it seems, are not precluded by the fact that the property is subject to a trust from taking advantage of the Statute.[3] And, secondly, the trust (as in other cases) must be express, and a merely constructive trustee in possession, such, for instance, as a purchaser holding under an agreement to purchase is not so affected with any trust as to be unable to take advantage of the Statute.[4]

[1] *Garrard* v. *Tuck*, 8 C. B. 231, 250.

[2] *Keen* v. *Deardon*, 8 East, 248, 263; *Smith* v. *King*, 16 East, 283; *Burrell* v. *Lord Egremont*, 7 Beav. 205, 234; *Doe* d. *Jacobs* v. *Phillips*, 10 Q. B. 130; *Garrard* v. *Tuck*, 8 C. B. 231, 250; *Earl Pomfret* v. *Lord Windsor*, 2 Ves. 472; *Roe* d. *Reade* v. *Reade*, 8 T. R. 118.

[3] *Melling* v. *Leak*, 16 C. B. 652; *Stanway* v. *Rock*, 4 M. & Gr. 30.

[4] *Stanway* v. *Rock*, 1 C. & M. 549.

This doctrine is well illustrated by the following opinion of the Court in an American case:[1]— "Equity makes the vendor without deed a trustee for the vendee for the conveyance of the title, the vendee is a trustee for the payment of the purchase-money and the performance of the terms of the purchase. But the vendee is in no sense the trustee of the vendor as to the possession of the property sold; the vendee claims and holds it of his own right for his own benefit, subject to no right of the vendor, save the terms which the contract expresses; his possession is therefore adverse as to the property, but friendly as to the performance of the conditions of the purchase." Purchaser in possession under agreement.

A bequest of personalty in trust to pay debts does not at all vary the legal liability of the parties, or make any difference with respect to the effect and operation of the Statute itself. Executors are, in point of law, trustees for creditors, and there is nothing whatever added to their legal liabilities from the mere circumstance of the testator himself declaring in express terms that the estate shall be subject to the payment of his debts.[2] This is so as to debts not already barred at the testator's death, Bequest or devise in trust to pay debts.

[1] *Blight's lessee* v. *Rochester*, 7 Wheat. (U. S.) 535.

[2] *Per* Lord Lyndhurst in *Scott* v. *Jones*, 4 Clark & Fin. 382. And see *Anon.*, 1 Salk. 154; *Andrews* v. *Brown*, Prec. Ch. 385; *Blakeway* v. *Earl of Strafford*, 2 P. W. 373; *Oughterlony* v. *Earl Powis*, Amb. 231; *Proud* v. *Proud*, 32 Beav. 324.

and *à fortiori* as to debts then barred.[1] And the case is the same though the testator imagined he was dealing with realty.[2]

But where there is a direction to pay certain scheduled debts out of a particular fund it may be otherwise.[3]

A devise of realty upon trust to pay debts is upon a different footing, inasmuch as it imposes on the devisee a duty in excess of his legal liability, or rather perhaps did so previously to the Act 3 & 4 Wm. 4, c. 104. Thus a devise of realty upon trusts to pay debts will prevent the operation of the Statute in the case of debts not barred in the testator's lifetime,[4] but will not revive debts so barred.[5] As a general trust to pay debts can only apply to such debts as the person creating the debt is bound to pay.[6]

But it is otherwise in the case of a devise in trust to pay the debts of another person, which may, it seems, revive debts barred during the devisor's lifetime.[7] A simple charge of debts upon realty does not create a trust.[8]

[1] *Burke* v. *Jones*, 2 Ves. & Bea. 275.

[2] *Scott* v. *Jones*, *ubi supra*.

[3] *Williamson* v. *Naylor*, 2 Y. & C. 210 n.

[4] *Scott* v. *Jones*, *ubi supra*; *Burke* v. *Jones*, *ubi supra*.

[5] Ibid. But see *Jones* v. *Stratford*, 3 P. W. 84.

[6] *Hargreaves* v. *Mitchell*, 6 Madd. 326; *O'Connor* v. *Haslam*, 5 H. L. 170–75.

[7] *O'Connor* v. *Haslam*, *ubi supra*; *Richards* v. *Foster*, cited in *O'Connor* v. *Haslam*, 5 H. L. 174.

[8] *Jacquet* v. *Jacquet*, 27 Beav. 332.

It is necessary to notice that it may be contended that the distinction above referred to as existing between a bequest in trust of personalty and a similar devise of realty has ceased since realty has been made liable for debts by Statute, and that now realty is on the same footing as personalty upon this subject.

Trusts for sale.

Where there was a devise of land upon trust for sale, the proceeds to be considered as part of the personal estates, and the trustees allowed part of the land to remain unsold for fifty years, it was held that the trust was an express trust within section 25 of the Statute of 3 & 4 Wm. 4, c. 27. And a decree for the execution of the trusts as to the unsold land was made at the suit of a residuary legatee.[1] But where the property had been sold and no longer existed *in specie*, the contrary had been held.[2]

Acknowledgment by trustees.

As a general rule, the acknowledgment of a debt by a trustee will be binding on the *cestuis que trustent*.[3]

A security by way of a trust for sale is to be regarded as an ordinary mortgage in reference to the Statutes of Limitation.[4]

In *Salter* v. *Cavanagh*,[5] where a testator gave

[1] *Mutlow* v. *Bigg*, L. R. 18 Eq. 246. This decision was afterwards reversed on appeal, but on different grounds.

[2] *Pawsey* v. *Barnes*, 20 L. J. Ch. 393.

[3] *Toft* v. *Stephenson*, 1 D. G M. & G. 41.

[4] *Locking* v. *Parker*, L. R. 8 Ch. 30; *Yardley* v. *Holland*, L. R. 20 Eq. 428.

[5] 1 D. & Wal. 668.

land, producing a clear profit rental of 60*l*., to trustees upon trust to pay annuities for life, less in amount in all than the rental, but declared no trust of the surplus, it was decided that there was declared an express trust within the meaning of the 25th section of the Real Property Act of Limitation, and that the heir of the testator was not barred by lapse of time from claiming the surplus.

Benefit societies.

Where the funds of an association in the nature of a benefit society were vested in trustees, it was held that neither the association nor the trustees were trustees for the purposes of the Statute; and a claim to a pension due to the widow of a member of such a society was held barred as to the chief part thereof after the lapse of more than twenty years; in the particular case, the claim being to a sum of money payable *de anno in annum*, the plaintiff was allowed so much thereof as had become due within six years before filing the bill, with interest from the filing of the bill.[1] Persons, however, appointed trustees of the assets of a certain benefit society, called the "Rational Society," which was insolvent, were considered to be trustees for the creditors within the Statute.[2] There is no fiduciary relation between a mutual assurance society or its trustees and a policy holder or grantee of an annuity.[3]

[1] *Edwards* v. *Warden*, 9 Ch. 589.

[2] *Pare* v. *Clegg*, 29 Beav. 495.

[3] Ibid., p. 505.

Mistake of trustee in possession.

A mistake by a trustee in possession of land, who treats a wrong person as equitably entitled, will not affect the rights of the rightful claimant. He is in possession on behalf of his *cestuis que trustent*, and his making a mistake as to the persons who are really entitled, will not affect the question.[1]

[1] *Lister* v. *Pickford*, 34 Beav. 576.

CHAPTER XXI.

ACCOUNTS AND PARTNERSHIP.

Action of account.

THE old action of account was one of the most ancient forms of action at the Common Law, but though attempts were made from time to time to revive it, it gradually fell into disuse, being superseded by the more convenient method of a suit in Equity;[1] though in simple cases in the form of assumpsit it still practically continued.[2] Limitation of time in Equity was early held in this respect to be the same as that in law.[3]

Where all the items of an account are on one side, as, for instance, in a tradesman's bill, the fact that some items are within the time allowed does not take the earlier items out of the operation of the Statute.[4]

Mutual open accounts. Old difficulties.

Difficulty was early felt in the treatment of mutual accounts, which it was thought might be exempted from the ordinary Statute Law of Limitations, partly on the terms (now altered) of the then existing

[1] Story, Eq. Jur. 442.

[2] Ibid.

[3] *Lockey* v. *Lockey*, Prec. Ch. 518.

[4] *Robarts* v. *Robarts*, 1 M. & P. 487; *Ashby* v. *James*, 11 M. & W. 542; *Smith* v. *Forty*, 4 C. & P. 126.

Statute, which excepted from its operation merchant's accounts, and partly upon broad general principles. It was laid down in *Scudamore* v. *White*,[1] that the Statute had no application in the case of open accounts. Lord Talbot, however, held, in accordance with what seems the present law, that an open mutual account is within the Statute, unless there is some item of charge and debit within six years before the bill was filed.[2] And Lord Eldon says, "between common persons (that was to say, amongst persons not coming within the then existing exception as to the accounts of merchants), as long as the account is continued, the Statute does not apply * * * but between merchants an open account will do though there has been no dealing within six years." In *Catling* v. *Skoulding*,[3] Lord Kenyon said, that where there was no item of account within six years, the plaintiff would be precluded from his remedy unless he could bring his case within (the now abolished) exception as to merchants' accounts. And this seems to be the present law; so that, where there have been mutual accounts, the Statute is retarded by every fresh item, provided such item is within six years of previous items. And it seems to make no difference on

Where there are mutual accounts each item sets time running afresh.

[1] 1 Vern. 474.

[2] See *Foster* v. *Hodgson*, 19 Ves. 183.

[3] 6 Term Rep. See also on the subject *Martin* v. *Heathcote*, 2 Eden, 169; *Barber* v. *Barber*, 18 Ves. 286; *Robinson* v. *Alexander*, 2 Cl. & Fin. 717.

which side the items are which are within the six years.[1]

There must be a really mutual or "alternate" course of dealing to bring accounts within the exception. Thus, in cases where all the items of the account were on one side, as in the case of a tradesman's bill, even before the last-mentioned enactment, it was held that the fact of some items being within the statutory six years, did not exclude the bar of the Statute as to the earlier items.[2]

And where articles are continuously delivered by tradesmen or others, time runs as to each separate article from its delivery.[3]

Account stated.

As soon as an account ceases to be open and becomes an account stated, the balance which is found due is at once subject to the ordinary law of limitations.[4]

However, this balance may become an item in a fresh account. Thus, in *Farrington* v. *Lee*,[5] North, C.J., agreeing with Wyndham and Scroggs, JJ., says, "If after an account stated, upon the balance of it a sum appear due to either of the parties, which sum is not paid, but is afterwards thrown into a new

[1] *Ord* v. *Ruspini*, 2 Esp. 569.

[2] *Robarts* v. *Robarts*, 1 M. & P. 487; *Ashby* v. *James*, 11 M. & W. 542; *Smith* v. *Forty*, 4 C. & P. 126.

[3] Angell, 5th ed., p. 13.

[4] *Williams* v. *Griffiths*, 2 Cr. M. & R. 45; *Mills* v. *Fowkes*, 7 Scott, 444; *Cottam* v. *Partridge*, 4 M. & Gr. 271; *Clark* v. *Alexander*, 8 Scott, N. R. 147; *Waller* v. *Lacy*, 1 M. & G. 54.

[5] 1 Mod. 270.

account between the same parties, it is now slipped out of the Statute again."

Open accounts.

And now there is Legislative authority, by virtue of section 9 of the Act 19 & 20 Vict., c. 97 (commonly known as the Mercantile Law Amendment Act), that a subsequent transaction will not have the effect of removing the bar of time where an account has already ceased for six years. The words of the section are as follows:—"No claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit, by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." Lord Westbury, in *Knox* v. *Gye*,[1] states that this enactment was directed against the erroneous notion that an account, which had been barred by lapse of time, might be considered as opened and revived by the receipt of a subsequent sum of money more than six years after the date of the last entry.

Accounts-merchant.

The accounts of merchants were, in the Act of James the First, excepted to some extent from the operation of the Statute. The extent of this exception was a subject of much disagreement. In some cases, as in *Catling* v. *Skoulding*,[2] it is implied that in such accounts mere time would never constitute a bar. On the other hand, Henley, L.C., laid down the rule following:—"The difference

[1] L. R. 5 H. L. 674.

[2] 6 Term Rep. 189.

between merchants' accounts and those of other persons is that a continuation afterwards will prevent the Statute running against the former accounts, but will be a bar as to all articles before six years in other accounts."[1] But the question is now one of little importance, except as illustrating the law as to accounts in general, the exception in favour of accounts-merchant having been abolished by the 9th section of the Mercantile Law Amendment Act, 1856.[2]

Statute does not apply during a partnership.

So long as a partnership continues existing, and each partner is in the exercise of his rights and the enjoyment of his property, the Statute Law of Limitations has no application at all between the partners.[3]

Account between surviving and dead partner barred after six years.

Where one partner dies, questions of difficulty and much importance have been raised as to what length of time (if any) will be a bar against or in favour of (as the case may be) the deceased partner's estate. The subject was very much considered in the recent case of *Knox* v. *Gye*, on appeal to the House of Lords.[4] The result of the decision in that case, which was in effect an action by the appellant, as executor of the deceased partner, against the surviving partner for

[1] *Martin* v. *Heathcote*, 2 Ed. 169.

[2] Appendix.

[3] Lindley on Partnership, vol. ii., 980; *Miller* v. *Miller*, L. R. 8 Eq. 499; *Millington* v. *Holland*, W. N. 22, Nov. 1869; *Robinson* v. *Alexander*, 2 Cl. & Fin. 717; *Foster* v. *Hodgson*, 19 Ves. 183.

[4] L. R. 5 H. L. 674.

an account of the share of the deceased partner, seems to be that a Court of Equity will not decree an account between a surviving partner and the estate of a deceased partner after the lapse of six years, and that whether the surviving partner be plaintiff or defendant. And further, that the *punctum temporis* from which time commences to run is the date at which the partnership estate is vested in such surviving partner.[1]

The decision in *Knox* v. *Gye* was, according to Lord Westbury, in accordance with long-settled law which had been laid down as early as *Lockey* v. *Lockey*.[2] And in *Tatam* v. *Williams*,[3] Wigram, V.-C., says, "In this Court there is direct and very high authority for the proposition that a Court of Equity will not, after six years' acquiescence * * * decree an account between a surviving partner and the estate of a deceased partner;" but it must be observed that the decision of their lordships in *Knox* v. *Gye* was not unanimous, Lord Hatherley being the dissentient. Knox v. Gye.

The real difficulty involved in denying to the representatives of a deceased partner an account against a surviving partner, after the lapse of six years, arises in cases where valuable partnership assets fall in to the surviving partner after that period. In *Knox* v. *Gye*,[4] Lord Colonsay remarks on this point as follows:—"I do not say that if a

[1] Ibid.
[2] Prec. in Ch. 518.
[3] 3 Ha. 347.
[4] *Ubi supra.*

sum is unexpectedly recovered after the lapse of six years, the executor of the deceased partner, though he has lost the right to sue for an account of the partnership concerns, may not in another kind of suit demand a share of the particular fund so recovered." The observations of Lord Chelmsford on the subject in the same case are as follows:— "There may be a difficulty in determining what is the right of an executor of a deceased partner when he has allowed the Statute of Limitations to run against his claim to an account, and a debt has been received by the surviving partner after the six years has elapsed. But this is a difficulty occasioned by his own laches, and I see no reason why, if he thinks that his interest in the sum received has not been absorbed by its application to pay debts due from the partnership, why he should not have a right to sue for his share in this sum (a very different thing from a suit for an account of all the partnership transactions), the surviving partner being at liberty to defend himself by alleging and proving that the whole sum received has been applied, or was applicable to the payment of partnership liabilities."

It may be remarked, however, that according to the dictum of Lord Westbury, in the same case of *Knox* v. *Gye*, the representatives of a deceased partner has no specific interest in, or claim upon any part of the partnership estate, so that it seems doubtful how far he would be able, as suggested

by Lord Colonsay, to sue for the share of any newly-acquired asset as *primâ facie* due to him, and in that way, in fact, obtain an account from the defendant by throwing the onus of proof (which would, in fact, require an account of the partnership transactions) upon the defendant, to show that the whole or part of such plaintiff's *primâ facie* share was applicable to satisfy partnership liabilities. Further, it is difficult to see how laches could be imputed on the part of the representatives of a deceased partner, at all events in respect of unexpected assets which fall in after the lapse of six years, in respect that he has not kept alive his right to have an account by filing a bill or even, as suggested by Lord Hatherley, who (as has been said) dissented from the judgment by filing continuous bills at sexennial intervals. It was in the case, now in discussion, contended that a surviving partner was a trustee of the partnership assets, and as such not within the Statute Law of Limitations, but this contention was (Lord Hatherley dissenting) overruled; Lord Westbury expressing a clear opinion that there was no fiduciary relation between a surviving partner and the representatives of one deceased, and that the former was not a trustee in the strict and full sense of the term, the term being so used only by a convenient but deceptive metaphor, and the rights of the parties being strictly legal rights.

Surviving partner is not a trustee of the assets.

As long as a partnership continues each partner

Acknowledg-

ment by partner.

is an agent for the purpose of making an acknowledgment under the Statute of Limitations.[1]

Under the old theory of acknowledgment an acknowledgment made by a continuing partner after a dissolution of partnership might revive a debt,[2] but under the new theory and since the Mercantile Law Amendment Act, 1856, such agency will terminate at dissolution, and after a partnership is dissolved one of the late firm cannot by his act or admission involve his co-partner in any new legal liability.[3] It is possible, however, that it might be otherwise if the admission consisted of a part payment out of assets belonging to the late firm.[4]

If a partner die during the partnership it seems that the maxim *contra non valentem agere non currit lex* prevails and that time will not run against his estate, and in favour of the surviving partner, till there is administration to the estate of the dead partner, unless there have been disputes so as to give a cause of action before the death of the dead partner.[5]

[1] *Watson* v. *Woodman*, L. R. 20 Eq. 730.

[2] *Wood* v. *Brodick*, 1 Taunt. 104; *Pritchard* v. *Draper*, 1 Russ. & Myl. 191.

[3] *Watson* v. *Woodman*, L. R. 20 Eq. 721; *Thompson* v. *Waithman*, 3 Drew. 628; *Bristow* v. *Miller*, 11 Ir. L. R. 461; *Kilgour* v. *Finlyson*, 1 H. B. 155.

[4] *Watson* v. *Woodman*, L. R. 20 Eq. 431.

[5] *Angell* (6th ed.), 58.

CHAPTER XXII.

LEGACIES.

3 & 4 Wm. 4, c. 27, s. 40, applies to all legacies.

THE Statute 3 & 4 Wm. 4, c. 27, s. 40 applies to all legacies whether charged upon land or not,[1] and to residuary property.[2] Previously to that Statute the right of a legatee was never barred except by presumption of payment, and there could be no presumption of payment contrary to the duty of an executor.[3] The present Statute limits the time for the recovery of a legacy to the period of twenty years after a present right to receive the same.[4]

Legatee has "a present right to receive" legacy at the end of one year.

That is to say usually, and except as to after-acquired assets, from the expiration of one year from the testator's death, from which time the legatee is entitled to interest.[5] Romilly, Master of the Rolls, in *Earle* v. *Bellingham*,[6] held that the two periods, namely that from which the Statute commences to run, and that from which interest is payable are identical.

[1] This was doubted, see *Bullock* v. *Downes*, 9 H. L. 1; *Sheppard* v. *Duke*, 9 Sim. 567.

[2] *Per* Alderson, B., *Prior* v. *Horniblow*, 2 Y. & C. Ex. 200.

[3] Ibid., 207. There is still no limit generally in America. Angell, 90.

[4] 3 & 4 Wm. 4, c. 47, s. 40. By the new Act the limit will be twelve years. See Appendix, 37 & 38 Vict., c. 57, s. 8.

[5] Williams' Exors., 6th ed., 1286. *Turner* v. *Buck*, W. N. 1874, p. 131; L. R. 18 Eq. 301.

[6] (No. 2.) 24 Beav. 448. But see *Spurway* v. *Glynn*, 9 Ves. 483; and *Shirt* v. *Westby*, 16 Ves. 393.

But inasmuch as the executor's year is allowed only for convenience and does not prevent vesting, it may possibly be otherwise where there are clearly assets.[1] And there may be a further question where there is a direction in a testator's will for earlier payments.[2]

Residuary legatees.

Time commences to run against a residuary legatee as soon as he has a present right to receive the residue, that is to say, when he has an opportunity of ascertaining what is the clear residue and receiving payment thereof.[3] From *Adams* v. *Barry* it appears that time runs in favour of an executor as to assets from the time they severally come into his possession, and an enquiry in that case was ordered what assets had come into the hands of the executor during the twenty years previous to the suit.[4] And this case is explained by Wood, V.-C., in the subsequent case of *Binns* v. *Nichols*,[5] as follows:—"what the Vice-Chancellor held (in *Adams* v. *Barry*) was that assets which might have been recovered by suit twenty years before filing the bill could not be

After-acquired assets.

[1] *Gartshore* v. *Chalie*, 10 Vesey, 13. "If a case were produced in which it was quite clear that there were no debts, the Court would give the fund to the party, notwithstanding there had not been a lapse of twelve months." *Per* Lord Eldon.

[2] Williams' Exors., 6th ed., 1266.

[3] *Per* Alderson, B., in *Prior* v. *Horniblow*, 2 Y. & C. Ex. 200, 206. See also *Adams* v. *Barry*, 2 Coll. 285; *Binns* v. *Nichols*, L. R. 2 Eq. 259. *Larkins* v. *Phipps*, W. N. 1873, 207. And see *Knox* v. *Gye*, L. R. 5 H. L. 674.

[4] 2 Coll. 285.

[5] L. R. 2 Eq. 257. But see *Reed* v. *Fenn*, 35 L. J. Ch. 464.

recovered; but as to assets that had fallen into possession since that they were not barred.

Respective rights of a pecuniary and residuary legatee in after-acquired assets.

There is a difference between a residuary and a pecuniary legatee as regards their right to after-acquired assets. Thus, where an annuity had fallen in more than twenty years after testator's death a residuary legatee was allowed to enforce his right against it, but an unpaid pecuniary legatee was not allowed, though the Master of the Rolls said that it would have been otherwise had the latter proved that there had not been sufficient assets till within twenty years to satisfy his legacy, but that this he had not done, and the onus of the proof lay with him.[1]

Annuities.

Annuities given by will may for most purposes be treated as legacies.[2] An annuity is payable, however, from the date of the testator's death,[3] unless a contrary intention appears.[4]

There is, however, much difficulty in dealing with annuities, except those charged on land (which are expressly dealt with by Statute) inasmuch as the right to receive each payment of the annuity only arises when such particular payment is due, though there may be many years of unpaid arrears, and therefore it might seem that no lapse of time could

[1] *Bright* v. *Larcher*, 27 Beav. 130.

[2] *Ward* v. *Grey*, 26 Beav. 485.

[3] *Gibson* v. *Bott*, 7 Ves. 96; *Fearns* v. *Young*, 9 Ves. 553.

[4] *Houghton* v. *Franklin*, 1 S. & S. 390; *Storer* v. *Prestage*, 3 Mad. 167.

bar the annuitant. In *Edwards* v. *Warden*, where by the resolutions of an association in India of the nature of a benefit society, certain pensions were to be given to the widows of the members out of funds vested in the society, the claim of a widow for arrears of an annuity which had remained unpaid for upwards of twenty years was allowed as to six years' arrears, the Court being of opinion that the claim was in substance for a sum of money payable *de anno in annum*, and that as regarded so many of such annual sums as became due within six years before the filing of the bill the plaintiff was entitled to a declaration and decree.[1] If an annuity is bequeathed by will out of personalty only, Wood, V.-C., seemed to be of opinion that if no payment at all on account thereof were made for twenty years the right of the annuitant would be barred;[2] an opinion adopted by Lord St. Leonards,[3] but the question has not, it is believed, been settled; and the case of a personal annuity appears to be a *casus omissus* in the Statute law, and one which, as we have said, it is difficult to deal with on principle.

Arrears of annuity.

Arrears of an annuity charged on personalty are not interest on a legacy within s. 42 of 3 & 4 Wm. 4, c. 27, and more than six years' arrears may therefore be recovered.[4] It is otherwise, however, where

[1] L. R. 9 Ch. 495.

[2] *Re Ashwell's Will*, Johns. 112.

[3] R. P. Statutes, p. 138.

[4] *Roch* v. *Callen*, 6 Hare, 531. This is so at all events in the present case, where there is a trust for payment.

and so far as the annuity is charged on realty. Arrears of interest on legacies in general cannot be recovered for more than six years.[1] Interest, legacies in general.

A legacy may, however, be so held as to be a trust, and where the executor has become a trustee of a legacy for the legatee the ordinary rules that exist between trustee and *cestui que trust* apply, and the legatee will not be barred by any lapse of time.[2] This happens more readily in the case where the executor is also expressly a trustee than where he is simply executor. Where an executor upon trust, who has therefore the double character of executor and trustee, has set apart and appropriated a sum to satisfy a certain legacy, he is considered to have changed the character of executor for that of trustee,[3] as much as if he had been trustee only and a different person as executor had transferred to him the money. In *Dix* v. *Burford*,[4] an executor upon trust had assented to a specific legacy, and it was held that the legacy became thereby clothed with a trust. Where executor becomes trustee.

An executor in trust becomes a trustee of a residue as soon as it is ascertained.[5] An executor How an executor becomes trustee.

Playfair v. *Cooper*, 9 Beav. 252; *Lewis* v. *Duncombe*, (No. 2,) 29 Beav. 175. But see Lord St. Leonards, R. P. Stat., 137.

[1] 3 & 4 Wm. 4, c. 27, s. 42.

[2] *Phillipo* v. *Munnings*, 2 My. & Cr. 309.

[3] *Byrchall* v. *Bradford*, Madd. & Geld. 13, 235; *Dix* v. *Burford*, 19 Beav. 409; *Brougham* v. *Poulett*, 19 Beav. 133, 134.

[4] *Ubi supra.*

[5] *Willmott* v. *Jenkins*, 1 Beav. 401; *Ex parte Dover*, 5 Sim. 500; *Davenport* v. *Stafford*,

may be a trustee either by virtue of the wording of the will, or by implication arising from his acts.

Where executor becomes trustee by implication only.

As to the latter case, if the legacy is bequeathed simply, yet the executor may make himself a trustee by implication, by appointing assets for a particular legacy, though, as a fact, in most of the decided cases, including *Phillipo* v. *Munnings*, the executor had been made a trustee by the terms of the will. In *Tyson* v. *Jackson*,[1] Romilly, Master of the Rolls, makes the following remarks on the subject:—"It is clear when an executor retains the money for payment of the legacy, that he becomes, as in the case of *Phillipo* v. *Munnings*, a trustee of the particular fund or sum of money, retained distinctly from his character of executor. It is as distinct as if the testator had directed his executor to pay the legacy over to A. B. in trust for the legatee, and it had actually been paid over. A. B. would then be a trustee for the legatee. So, too, the executor, when he has retained that sum of money, is in exactly the same situation." In this case also, however, the executor had signed a document to the effect that he had retained the sum in question in trust for the legatee, so that the remarks of the Master of the Rolls were not wholly necessary to the decision.

By 23 & 24 Vict. c. 38, the Statute is extended

14 Beav. 319, 331; *Dinsdale* v. *Dudding*, 1 Y. & C. C. C. 265; *Freeman* v. *Dowding*, 2 Jur. N.S. 1014; *Downes* v. *Bullock*, 25 Beav. 54; *Bullock* v. *Downes*, 9 H. L. C. 1.

[1] 30 Beav. 304, 386. See *ex parte Dover*, 5 Sim. 500.

to claims against the administrator of an intestate's estate,[1] but the case of a claimant interested in the estate of a person dying only partially intestate, does not seem expressly provided for, and there may be some difficulty in holding such a case within the Statute Law of Limitation; and it may be observed, though the point is one, perhaps, of not great importance, that by 11 Geo. 4 & 1 Wm. 4, c. 40, the executor in such a case is declared a trustee for the next of kin of the undisposed-of residue.

Money charges and legacies.

Much difficulty has been felt as to how far claimants to money charged upon land, or legacies, are within the protection of the preceding saving clauses, in cases of their disability. It is to be noted that by the wording of section 40 (which deals with money-charges and legacies) of the Act 3 & 4 Wm. 4, c. 27, the twenty years fixed does not commence to run till after "a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of the same."[2] These words themselves amount to a protection, in many cases of disability; for instance, in cases of infancy and unsoundness of mind; though, perhaps, it might be argued that the protection would cease on the appointment of a proper guardian or committee, as the case might be, inasmuch as he would be a person capable of giving

[1] *Reed* v *Fenn*, 35 L. J. Ch. 464; *Larkins* v. *Phipps*, 1873, 207. W. N.

[2] Appendix.

a discharge or release within the terms of the section.

Money charges and legacies.

It may be considered that independently of the terms of the section we have quoted, money charges on land, and legacies (if charged on land) are interests in land as defined by the first section of the Act, and are thus within the saving of the previous clauses of the Act in regard to disabilities.[1]

Acknowledgments.

It will be seen that there is provision for the case of part payment of principal or interest, or acknowledgment in writing. The acknowledgment may be made by the person by whom the legacy is payable, or his agent, to the person entitled, or his agent.[2]

Refunding by residuary legatees.

Where payments were made to residuary legatees, while debts of the testator remained unpaid, which debts were kept alive against the executors, it was held that the Statute was no bar in favour of the residuary legatees, inasmuch as the executors had committed a breach of trust, and they as mere volunteers could be no better off.[3]

[1] 3 & 4 Wm. 4, c. 27, s. 1.

[2] Ibid., s. 40.

[3] *Fordham* v. *Wallis*, 10 Ha. 217; 22 L. J. Ch. 548.

CHAPTER XXIII.

FRAUD.

Fraud has always been a ground of relief in equity, and it is admitted that a Court of Equity will wrest property fraudulently acquired not only from the perpetrators of the fraud, but to use Lord Cottenham's language, from his children and his children's children, or, as was said in *Huguenin* v. *Beaseley*,[1] and *Bridgman* v. *Green*,[2] from any persons amongst whom he may have parcelled out the fruits of his fraud. This equitable principle has now, so far as regards realty, been crystallized into Statute law by the provisions of section 26 of the Real Property Limitation Act.[3] This section was made on the advice of the Commissioners on the law of real property, and the provisions thereby made were intended to represent the existing equitable doctrine as then understood.[4] The reason offered by Lord Redesdale why, if fraud has been concealed by one party, and until it has been

Fraud has always been ground of relief in equity.

And is so now by Statute.

[1] 14 Ves. 273.

[2] Wilmot's Notes, 58. But as to Torts, see Index.

[3] See Appendix.

[4] R. P. Commissioners' First Rep., p. 58.

discovered by the other, the Statute shall not operate as a bar is this, that the Statute ought not in conscience to run; the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time.[1]

Ejectment bill.

Though equity will, even independently of any Statute, relieve against fraud,[2] non-discovery of the fraud till within the proper period must be alleged in the bill,[3] and in law it is said that fraud will not prevent the operation of the Statute, however great or however carefully concealed it may have been.[4] Consequently, it was decided that a mere ejectment bill, which formerly could not otherwise have been properly brought into a Court of Equity, might be properly so brought where fraud was involved.[5] On the contrary, there are cases in which it has been held that fraud may form a good replication in law.[6] And a similar doubt still exists in America,[7] but in any case it appears that equity had a concurrent jurisdiction. And the question now, since

[1] *Hovenden* v. *Lord Annesley*; 2 Sch. & Lef. 634.

[2] *South Sea Co.* v. *Wymondsell*, 3 P. W. 143.

[3] Ibid.

[4] *Brooksbank* v. *Smith*, 2 Y. & Coll. 58; *Imperial Gas Light Co.* v. *London Gas Co.*, 10 Ex. 39; *Parham* v. *Macrory*, 6 Rich. Eq. 140.

[5] *Vane* v. *Vane*, L. R. 8 Ch. 391 n; *Chetham* v. *Hoare*, L. R. 9 Eq. 571; *Petre* v. *Petre*, 1 Drew. 371–97.

[6] *Bree* v. *Holbech*, Doug. 654; *Brown* v. *Howard*, 3 B. & Bing. 73.

[7] See opinions of Mr. Justice Spencer in *Troupe* v. *Smith*, 20 Johns. (N. Y.) 33, and of Mr. Justice Story in *Sherwood* v. *Sutton*, 5 Mason, 149.

the attempted fusion of Law and Equity, is perhaps of little importance.

Such fraud as will in equity prevent the bar of the Statute must be distinct in its characteristic,[1] and mere wrongful entry or possession is not equivalent to fraud unless there is designed concealment of important circumstances from the rightful owner. It has been decided that possession through a conveyance from a lunatic is not of itself evidence of fraud.[2] But it would be otherwise if *mala fides* were proved on the part of the purchaser.[3] Where a fine was levied with proclamations by a person aware of a flaw in his title, it was considered not a case of fraud, so as to take the case out of the then existing Law of Limitations.[4]

The fraud must be direct.

It will be observed that the exception introduced by this section applies only in the case of concealed fraud. And further, so long only as with due diligence the fraud could not have been detected. Therefore, in *Chetham* v. *Hoare*, where a register-book containing a certificate of marriage which formed a principal link in the title of the plaintiff had been fraudulently mutilated, as was alleged in the bill by one Edward Chetham, counsellor at law, yet it was held by Malins, V.-C., on demurrer, that the

What is concealed fraud within the Statute.

[1] *Petre* v. *Petre*, 1 Drew. 397; *Dean* v. *Thwaite*, 21 Beav. 621.

[2] *Price* v. *Berrington*, 3 Mac. & G. 486; *Manby* v. *Bewicke*, 3 K. & J. 342.

[3] *Lewis* v. *Thomas*, 3 Ha. 26.

[4] *Langley* v. *Fisher*, 9 Beav. 90; 15 L. J. Ch. 73. And see *Bellamy* v. *Sabine*, 2 Ph. C. C. 425.

fraud could have been discovered earlier with proper diligence, and that the bill was too late.[1] In this case the claim had, in fact, lain dormant for nearly one hundred and fifty years. Where an estate was intentionally omitted from an insolvent's schedule, it was considered an instance of concealed fraud.[2]

Dulness of claimant's intellect.

The Court will not enter into the question how far a fraud has been in effect concealed, owing to the exceptional dulness of the lawful claimant's intellect.[3]

Fraud is not readily presumed at a distance of time.

Where the question of fraud is raised, but there is a doubt of the existence of such fraud, the Court will not be inclined to presume it at a great distance of time, but will require strong *primâ facie* evidence.[4] "Length of time," said Mr. Justice Story, in an American case, "necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transaction, it operates by way of presumption in favour of innocence and against the imputation of fraud."[5]

[1] *Chetham* v. *Hoare*, L. R. 9 Eq. 571.

[2] *Sturgis* v. *Morse*, 24 Beav. 541.

[3] *Manby* v. *Bewicke*, 3 K. & J. 342; *Bridgman* v. *Gill*, 24 Beav. 302.

[4] *Charter* v. *Trevelyan*, 4 L. J. N. S. Ch. 229; 11 Cl. & Fin. 714; *Bonney* v. *Ridyard*, cited in 17 Ves. 97.

[5] *Prevost* v. *Gratz*, 6 Wheat. (U.S.) 481. In *The Marquis of Clanricarde* v. *Henning*, 30 Beav. 175, a bill to impeach a purchase by a solicitor from his client was considered too late after a lapse of more than forty years.

It will be seen that an innocent purchaser for value is, by the 26th section of the Act of William the Fourth, protected against the claims which the rightful owner might have otherwise prosecuted, on the ground of original fraud by those from whom such a purchaser claims. The effect of the section seems to be to strike out the fraud altogether as against such purchaser, so that he is at once protected on making his purchase if the legal time has expired previously to his purchase.

An innocent purchaser is protected.

An innocent person claiming under a marriage settlement without notice is no doubt a purchaser for value; and the express wording of the section seems to point to something more than constructive notice, in fact, to some personal knowledge on the part of a person who claims protection as such a purchaser in order to defeat his claim.[1] But with reference to that question, James, L.J., in delivering the judgment of the Court in *Vane* v. *Vane*,[2] remarks as follows:—"It appears to us beyond all question that, as the law of this Court stood when the Statute was passed, the knowledge of the purchaser's agent, acquired in the course of the transaction, was for all purposes treated as the knowledge of the principal. It is also, we conceive, beyond question that, in every case except under this section, the Court would treat the knowledge of the purchaser's agent as the knowledge of the

Claimant under a settlement may be such.

Effect of knowledge by purchaser's agent.

[1] *Vane* v. *Vane*, L. R. 8 Ch. 383.

[2] Ibid.

purchaser. Was it, then, meant to make such a material alteration in the law? It is said in support of that (and not without force), that the words well known to the Court, 'purchaser for valuable consideration without notice,' were designedly not used, and the words, 'who had not participated in the fraud, and did not know, and had no reason to believe,' were designedly introduced, so that only those purchasers should be affected who had actual knowledge, and who were, in truth, making themselves morally accomplices in the fraud, in fact, receivers of stolen goods. But we think that what the Legislature meant to do was to exclude that constructive notice, which had certainly been carried to a very startling extent in many instances, and that it did not mean to subvert, in respect of one small portion of the law of this Court, the well-settled principles and rules on which all the Courts have acted in respect of the relation of principal and agent, and in respect of the extent to which the knowledge of the latter is deemed to be the knowledge of the former. The Courts had, in fact, held, almost in so many words, that what the agent knows the principal knows, that the knowledge of the agent was sufficient to create *mala fides* in the principal, and we think it therefore reasonable to hold that the Legislature used the words in the same sense, and that when they said, 'who did not know, or had not reason to believe,' they meant, 'who did not know or had not reason to believe either by

himself or by some agent, whose knowledge or reason to believe is by settled law deemed and taken to be his.' We think it would lead to very startling consequences if any other interpretation were put upon the clause. It is obvious that if actual personal knowledge were required, every corporation or joint-stock company might acquire a good title to property, although its officers and solicitors were perfectly conversant with the grossest fraud perpetrated by the vendor; and, in fact, any person might deal with impunity in the purchase of what is in substance stolen property, provided he takes care to leave the whole dealing from first to last in the hands of his agent."

CHAPTER XXIV.

EXECUTORS AND ADMINISTRATORS.

Executor may in his discretion pay barred debts.

When the remedy for a debt is barred by lapse of time, an executor or administrator is nevertheless not obliged to take advantage of the Statute, but may at his discretion satisfy the debt. "No executor," said Lord Hardwicke, "is compellable either in law or equity to take advantage of the Statute of Limitations against a claim otherwise well founded."[1] In fact, it has been treated as almost a duty in some cases for an executor to satisfy in that way, in his representative character, the conscience of his testator.[2] And Lord Hatherley, when Vice-Chancellor, in overruling a case of *M'Culloch* v. *Dawes*,[3] remarks as follows:—"It certainly cannot be considered to be law at the present day, that executors paying a debt against the recovery of which the Statute of Limitations might be pleaded as a legal bar render themselves liable to those who are interested in the testator's property.[4]

[1] *Norton* v. *Frecker*, 1 Atk. 524.

[2] *Williamson* v. *Naylor*, 3 Y. & C. 211, note (*a*).

[3] 9 Dowl. & Ry. 43.

[4] *Hill* v. *Walker*, 4 K. & J. 166.

An executor may, in the exercise of his discretion, pay a debt barred by the Statute of Limitations, notwithstanding that the personal estate of the testator is insufficient, and that the effect of such payment by him is to throw the burden thereof upon devisees of real estate, upon which the other debts are in consequence thrown.[1] In *Lewis* v. *Rumney*,[2] Lord Romilly, Master of the Rolls, remarks :—"I think it is much to be regretted that the Statute did not destroy the debt, instead of merely taking away the remedy for it. The result is that questions constantly arise, and amongst others, whether an executor may not pay a debt barred by lapse of time. I am of opinion that in the exercise of his discretion he may do so, and that it does not make the slightest difference whether the personal estate is sufficient or insufficient. If it be insufficient, the Statute gives the creditor a remedy against the real estate, but that does not interfere with the discretion of the executor."

Even against devisees of realty where the personalty is insufficient.

An executor may, therefore, at his discretion, pay debts due to others, the remedy for which is barred by lapse of time.[3] And further, he may (as might be expected) retain assets of the testator sufficient to pay such debts when due to himself.[4] And this

An executor may pay his own debts though barred.

[1] *Lewis* v. *Rumney*, L. R. 4 Eq. 451.

[2] *Ubi supra.*

[3] *Norton* v. *Frecker*, 1 Atk. 533; *Stahlsmidt* v. *Lett*, 1 Sm. & Giff. 415; *Ex parte Dewdney*, 15 Ves. 498; *Williamson* v. *Naylor*, 3 Y. & C. 211, note (*a*); *Hill* v. *Walker*, 4 Kay & J. 166; Williams on Executors, 6th ed., 1664.

[4] *Stahlsmidt* v. *Lett*, 1 Sm.

even when the debts were barred in the lifetime of the testator;[1] and his right to payment will not be affected by payment into Court of the testator's assets.

Where creditor is executor.

It has been decided that where a legatee is also executor of the testator, so that there is the same hand to give and receive, the question of the Statute does not arise as against such legatee.[2] In the case of *Binns* v. *Nichols*,[3] Lord Hatherley, then Vice-Chancellor, thus remarks:—"Having the whole of the testator's assets in his hands, he could not sue himself, the legacy was, therefore, either at home, that is to say, it would have been satisfied if there had been assets or it was kept alive, because, in ordinary circumstances, a bill might have been filed to keep it alive; but this gentleman (the administrator) could not have taken so absurd a step as to file a bill against himself for the purpose of making himself pay his own legacy." This reasoning would seem to apply to a case where the executor is an ordinary creditor of his testator, and the rule which holds good in the converse case, where the debtor is administrator to the creditor, seems to point the same way.[4]

Where debtor is administrator.

Notwithstanding the existence of the almost uni-

& Giff. 415; *Courtenay* v. *Williams*, 3 Ha. 539; *Coates* v. *Coates*, 33 Beav. 249.

[1] *Hill* v. *Walker*, 4 Kay & J. 166.

[2] *Binns* v. *Nichols*, 2 Eq. 256; *Adams* v. *Barry*, 2 Coll. 290; *Prior* v. *Horniblow*, 2 Y. & C. Ex. 200.

[3] *Ubi supra.*

[4] See *Rhodes* v. *Smethurst*, 4 M. & W. 42.

versal rule, that when time has once commenced to run in these cases, no alteration of circumstances in the way of any disability on the part of plaintiff or defendant will prevent it continuing to run;[1] yet in cases where the debtor takes out administration to the creditor, time will not run in the debtor's favour, even though it have commenced to run previously to his administration. And it appears that where administration of the goods of a creditor is given to a debtor, this being done by act of law, is not an extinction of the debt, but a suspension of the remedy.[2]

Where debtor is executor.

And where a debtor was appointed one of several executors of his creditor's will, but did not prove till his debt was already barred by lapse of time, yet it was held that the debt was revived by his subsequently proving the will, inasmuch as that proof related back to the testator's death, and he was ordered to account for the sum owing with interest.[3] It must, however, be carefully remembered that an executor or administrator will have no right, under any circumstances, to pay a debt or charge which shall absolutely itself (in distinction to the remedy for it) have become extinguished by Statute;[4] for instance, under section 34 of 3 & 4 Wm. 4, c. 27.[5]

But executor may not pay debt extinguished by Statute.

[1] See *supra*, p. 6.

[2] *Seagram* v. *Knight*, L. R. 2 Ch. 633; *Nedham's case*, 8 Rep. 135 (*a*); *Wankford* v. *Wankford*, 1 Salk. 299.

[3] *Ingle* v. *Richards* (No. 2), 28 Beav. 366.

[4] *Lewis* v. *Rumney*, L. R. 4 Eq. 451.

[5] Appendix.

Acknowledgment by executor binds the estate.

An acknowledgment by an executor will take a debt out of the Statute as against all parties beneficially interested.[1] Such is the law in England, though it appears to be otherwise in America.[2] And indeed the contrary view which is there held might seem more consistent with the modern theory of acknowledgment, which is, as we have seen, that it must amount to a new promise; for such a new promise by an executor would seem to be, on principle, invalid against him for (amongst other reasons) the absence of a moral consideration to support it.[3]

It was at one time considered that a promise by an executor must, in order to avoid the Statute, be express,[4] that is to say, of a more definite character than one which would be sufficient to bind the original debtor; but it would probably be now held, that the acknowledgment which would be binding on the original debtor would also be sufficient in its terms if made by his executor.[5]

Acknowledgment must be made by executor in representative character.

In order to bind the estate of the deceased, an acknowledgment by an executor should be made by him in his representative character as executor.[6]

[1] *Per* Lord Cranworth in *Toft* v. *Stephenson*, 1 D. G. M. & G. 41; *Fordham* v. *Wallis*, 10 Ha. 217; 22 L. J. Ch. 548; *Browning* v. *Paris*, 5 M. & W. 120.

[2] Angell, 266.

[3] See Ibid.

[4] *Tullock* v. *Dunn*, Ryan & Mood. 416.

[5] *Briggs* v. *Wilson*, 5 D. G. M. & G. 12. But see Williams' Executors, 7th ed., 1947.

[6] *Tullock* v. *Dunn*, Ry. & Moo. 416; *Scholey* v. *Walton*, 12 M. & W. 510.

Where executor is also devisee in trust.

Where persons, acting in the double capacity of executors and of trustees of real estate, made payments, which amounted to an acknowledgment of a debt, in their characters of executors, it was held not to revive the liability against the realty;[1] and it may be noticed that in such cases no principle of marshalling exists.[2]

Where time has nearly run against a creditor in his lifetime and he dies, his executor will be barred if the statutory time has elapsed, though he brings an action within a reasonable time after his testator's death.[3]

Where there is no legal representative of debtor.

Where a debtor dies intestate, and time has not commenced to run in his favour while alive, it will not commence to run in favour of his estate until letters of administration have been taken out to the deceased; inasmuch as there has never been any person against whom the creditor could have prosecuted his remedy.[4] And it is the same if the debtor appoints an executor until proof.[5] If, however, time has commenced to run in the debtor's lifetime, it will not cease so to do, although he die, and no personal representative be appointed.[6]

Where defend-

Where, however, the defendant has taken posses-

[1] *Fordham* v. *Wallis*, 10 Ha. 217; 22 L. J. Ch. 548.

[2] Ibid.

[3] *Penny* v. *Brice*, 18 C. B. N. S. 393.

[4] *Jolliff* v. *Pitt*, 2 Vern. 694; *Webster* v. *Webster*, 10 Ves. 93; *Burdick* v. *Garrick*, L. R. 5 Ch. 233.

[5] *Forrest* v. *Douglas*, 4 Bing. 704.

[6] *Rhodes* v. *Smethurst*, 4 M. & W. 42; *Boatwright* v. *Boatwright*, L. R. 17 Eq. 71.

ant administrator has been executor de son tort.

sion of the goods of the deceased debtor as *executor de son tort*, and subsequently obtains letters of administration, it appears that time begins to run in favour of the estate from the time when the defendant has become such *executor de son tort*, inasmuch as an *executor de son tort* could have been sued both at law and in equity.[1] In *Webster* v. *Webster*,[2] the plea of the *Statute of Limitations* was allowed by an executor whose testator died in 1788, but of whose will no probate had been taken out till 1802, and within six years of the filing of the bill, inasmuch as the defendant, the executor, had possessed himself of the testator's personal estate, and therefore might have been sued as *executor de son tort* previously to 1802.

Where there has been an executor de son tort.

In the very recent case of *Boatwright* v. *Boatwright*,[3] the case of *Webster* v. *Webster* has been quoted as an authority by Sir G. Jessel, Master of the Rolls, and as applicable to a case where the *executor de son tort* and the person who subsequently proved the will of a deceased debtor were different persons. In *Boatwright* v. *Boatwright* a testator, being at the time of his death in 1857, indebted to B. on simple contract, gave by his will his real and personal estate to his wife for life and appointed J. and E. executors. The will was not proved for

[1] 43 Eliz. c. 8; Williams on Executors, 7th ed., p. 265; *Webster* v. *Webster*, 10 Ves. 93; *Boatwright* v. *Boatwright*, L. R. 17 Eq. 71.

[2] *Ubi supra.*

[3] L. R. 17 Eq. 71, 75.

many years, but the widow took possession of all the property and paid interest on the debt up to February, 1864. In September, 1870, the will was proved, and then B. filed his bill on behalf of himself and other creditors against the widow and the executors. It was held that the claim was barred by the Statute of Limitations, and the bill was dismissed. It is to be noticed, however, that this case was mainly decided on the ground that the cause of action had already accrued in the testator's lifetime.

In considering the question involved in cases like *Webster* v. *Webster*, it is not perhaps foreign to the subject to notice the recent conflict of opinion as to how far an *executor de son tort* may be sued alone without the appointment of a legal personal representative to his testator. In *Rayner* v. *Koehler*,[1] a bill was thus sustained against an *executrix de son tort*. In *Cary* v. *Hills*,[2] however, Lord Romilly, Master of the Rolls, declined to follow *Rayner* v. *Koehler*, and in the most recent case of *Rowsell* v. *Morris*, Sir G. Jessel, Master of the Rolls, has done the same,[3] and held that the law of the Court was that a suit for administration is defective when the legal personal representative was not before it. This may possibly diminish the authority of cases where a

[1] L. R. 14 Eq. 263.

[2] L. R. 15 Eq. 79.

[3] L. R. 17 Eq. 23. And see *Penny* v. *Watts*, 2 Ph. 149; and *Beardmore* v. *Gregory*, 2 H. & M. 491; and *Coote* v. *Whittington*, L. R. 16 Eq. 534. See also the recent case of *In re Lovett*, L. R. 3 Ch. D. 198.

plaintiff has been denied a fresh right on the appointment of a legal personal representative of his debtor on the ground that he could have proceeded in the absence of such legal personal representative to recover his debt against the *executor de son tort;* a course which in equity at all events will be no longer open to him.

Query how far a claim may be maintained against the realty when personalty is discharged by time.

A curious question is raised in *Boatwright* v. *Boatwright*.[1] In that case it was contended that the debt in question had been revived as to the deceased debtor's realty by payments from time to time of interest on account thereof by the tenant for life of the real estate. And the question was raised (though it was not necessary to be decided) whether inasmuch as the plaintiff had lost the remedy against the personal estate, and could not therefore properly make the deceased's personal representative a party, he could in the absence of such legal personal representative enforce his claim on the real estate. On this point the Master of the Rolls remarked, "I think it must be held, when the point comes to be decided, that if the remedy against the personal estate is barred, and the remedy against the real estate has been kept alive by reason of payment, that the Court will find some means of making the real estate liable, although the creditor cannot make the legal personal representative a party to the suit."

Where the Statute Law of Limitations affords a debtor a complete defence, the Court is not at liberty,

[1] L. R. 17 Eq. 74.

whatever view it may take of the conduct of those who use the Statute for the purpose of refusing to perform admitted obligations, to deprive the defendants of their costs. A defendant is justified in taking advantage of those rights which the Legislature has expressly given him, and a plaintiff's bill in such circumstances must be dismissed with costs.[1]

Costs ought to be allowed a defendant who successfully pleads the Statute.

Where a creditor dies intestate, and the right of action has not accrued during his life, time will not commence to run against his representatives (except as to chattels real under section 6 of 3 & 4 Wm. 4, c. 27), until administration has been taken out to his effects, and a proper legal personal representative appointed. It is, indeed, settled law that no cause of action can accrue until there is some one capable of suing.[2] And in *Burdick* v. *Garrick*, Hatherley, L.C., observes, "I take the law to be that if the Statute has not begun to run during the lifetime of an intestate, then it does not begin to run until letters of administration to his estate have been taken out."[3]

Administration of creditor.

On the other hand, the Statute Law of Limitations is a good defence in cases where time has *once* commenced to run in favour of the debtor in the lifetime of the intestate, the absence of a personal representative in such a case not sufficing to make an ex-

[1] *Boatwright* v. *Boatwright*, L. R. 17 Eq. 75.

[2] *Murray* v. *East India Co.*, 5 B. & Ald. 204; *Perry* v. *Jenkins*, 1 Mylne & Cr. 118; *Cary* v. *Stephenson*, 2 Salk. 421.

[3] L. R. 5 Ch. 241.

ception to the well-known and almost universal rule in these matters that when time has once commenced to run it will never cease.[1] This rule, however, as we shall see, is not absolutely without exception.[2] And where an action, abated by the death of a defendant debtor, it was allowed to be continued within a reasonable time, though the statutory period had elapsed in the interval.[3]

Where creditor's executor has not proved.

Where, however, the creditor has not died intestate, but has appointed an executor, and that executor simply neglects to prove the will, the case is different, and there will not exist any saving until proof. The reason of this distinction is that while an administrator derives his title wholly from the Court of Probate, and has no title to the property of the deceased till the grant of letters of administration is made out, an executor has a title immediately by virtue of the will.[4] If, however, such executor eventually renounces probate, inasmuch as such renunciation relates back to the death of the testator, it seems doubtful how far the testator's estate could be held to have been represented at all, or time to have commenced to run against it. In fact, it may be argued that though when an executor delays to prove a testator's will, time runs against him from

[1] *Rhodes* v. *Smethurst*, 4 M. & W. 42; *Freake* v. *Cranefeldt*, 3 My. & Cr. 499; 2 Wms. Saund. 63 K.; *Sturgis* v. *Darrell*, 4 H. & N. 622.

[2] *Supra*, p. 227.

[3] *Curlewis* v. *Mornington (Earl of)*, 7 El. & Bl. 283; 26 L. J. Q. B. 439.

[4] *Woolley* v. *Clarke*, 5 B. & Ald. 744.

the testator's death, yet that if he eventually fails to prove at all and an administrator be appointed, time does not run against the latter till appointment; but there does not appear any direct authority on the subject.

No saving now as to chattels by 3 & 4 Wm. 4, c. 27, s. 6.

And now as to cases affecting realty and falling within the scope of the interpretation clause of 3 & 4 Wm. 4, c. 27, it has been provided that this doctrine, always a cause of inconvenience, and especially so as to realty, as tending to create insecurity of title, shall be abolished. The provisions of the 6th section of that Act are as follows:—"And be it enacted, that for the purpose of this Act, an administrator claiming the estate or interest of the deceased person, of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration."

How far s. 6 extends to later sections of the Act.

Considerable doubt has been entertained how far the provisions of this section extend to the subject matter of sections 40 and 42 of the same Act. On the one hand, the words, "for the purpose of this Act," in section 6 are in themselves general enough to include the subject matter of those later sections. On the other side, the wording of section 40, which expressly limits the date on which time shall commence to run to twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for the same, seems

rather to exclude the operation of the 6th section. The question, though one of considerable importance, does not appear to have at present received a judicial decision and must be regarded as still open.

Chief Clerk's certificate.

In a suit for administration it seems that the Chief Clerk will in his certificate disallow claims, the remedy for which is obviously barred by lapse of time.[1] But this rule in a creditor's suit will not extend to the debt of the creditor who commences the action, whose debt ought to have been resisted, if at all, by the executors before decree.[2] And in a case where the widow, who was the administratrix, and the four children of an intestate, being the whole of his next of kin, except a fifth child, who was believed to be dead, consented to waive the objection of the Statute. Yet it was held, on a summons to vary the Chief Clerk's certificate, admitting the barred claim, that the application was granted on the understanding that it was done by consent, and so far as regarded the share of the absent fifth child at the risk of the administratrix.[3]

We have seen that an executor or administrator may, in the ordinary course of his duties, at his discretion, either satisfy or not debts from his tes-

[1] *Alston* v. *Trollope*, L. R. 2 Eq. 205; *Scott* v. *Jones*, 4 Cl. & Fin. 382. But this may depend on the form of the decree or order, see *infra*, p. 244. And see *In re Cordwell's Estate*, L. R. 20 Eq. 644. And see next Chapter.

[2] *Ex parte Dewdney*, 15 Ves. 479.

[3] Ibid.

tator, the remedy for which is barred by lapse of time, and this uninfluenced by the wishes of those beneficially entitled to the testator's estate. A contrary rule appears, under the Code Napoléon, to prevail in France,[1] and the English rule seems certainly not free from objection. It now remains to consider who are entitled to set up the bar of the Statute in cases where the debtor's estate is being administered by the Court..

An executor or administrator is not bound to resist the suit of any creditor on the ground that such creditor's claim is barred by Statute.[2]

But after the decree has been obtained, any person interested, who takes advantage of the decree, may set up the Statute, whether the executor assents or not. Thus *cestuis que trustent* absent under the Chancery Amendment Act, may set up the Statute though their trustees do not.[3]

Subject to the qualification that no person may set up the Statute against the claim of the plaintiff in the suit on the admission of whose debt, in fact, all the proceedings are grounded.[4]

It does not appear that after decree the right to Revivor.

[1] "Les creanciers ou toute autre personne ayant interêt à ce que la prescription soit acquise peuvent l'opposer encore que le débiteur ou le proprietaire y renonce." Code Civil., s. 2225.

[2] *Castleton* v. *Fanshaw*, Prec. Ch. 100; *S. C.*, 1 Eq. Cases, Abr. 305; *Ex parte Dewdney*, 15 Ves. 498.

[3] *Briggs* v. *Wilson*, 5 D. G. M. & G. 12.

[4] *Briggs* v. *Wilson*, 5 D. G. M. & G. 12; *Fuller* v. *Redman*, 26 Beav. 214.

an order for revivor will be barred by Statute, but the Court will decline to make such order where there has been gross negligence on the part of the party requiring it.[1] Before decree, however, it seems that the Statute actually applies, and the plaintiff will be barred on lapse of the appropriate length of time after abatement.[2]

There is a question how far an executor or administrator is liable as for a devastavit if he allow time to run in favour of a debtor, and against the estate he represents.[3]

It is probable that where such a case resulted from undue delay on the part of the executor or administrator, he would be liable;[4] but this point, and the further questions which may arise, as to how far an executor or administrator is at liberty to revive debts barred by acknowledgment or part payment, and also what is the position as to the right to contribution of a co-executor who has acknowledged, and thus revived a debt against his co-executors and the estate, if judgment be recovered against him singly under the first section of Lord Tenterden's Act,[5] do not appear at present satisfactorily settled by the authorities.

[1] Daniel's Ch. P. 1386; Lord Redesdale, p. 273; *Higgins* v. *Shaw*, 2 Dr. & War. 356; *Alsop* v. *Bell*, 24 Beav. 451, 464.

[2] *Hollingshead's Case*, 1 P. W. 742, 744.

[3] *Hayward* v. *Kinsey*, 12 Mod. 573; *East* v. *East*, 5 Hare, 348.

[4] *Hayward* v. *Kinsey*, *ubi supra*; Williams' Executors, 8th ed., p. 1805.

[5] Appendix. In an Ameri-

In cases where the debt itself, and not only the remedy, is destroyed, as in the case of claims to realty barred by 3 & 4 Wm. 4, c. 27, no question of set-off can of course arise. Even under other Acts a set-off is within the Statute law, and a replication of the Statute may be a good answer to a plea of set-off.[1] And by section 4 of the Act of 9 Geo. 4, c. 14, commonly known as Lord Tenterden's Act, set-offs appear to be expressly included. The section is as follows:—"And be it further enacted, that the said recited acts (being the Act of 21 James 1, and a similar Irish Act of Charles 1) and this Act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant either by plea, notice, or otherwise." Set-offs.

An executor may retain a debt due by a legatee, the remedy for which is barred by Statute, as a set-off against a legacy.[2] And an administrator may set-off a similar debt against the debtor's share

can case it has been decided that a joint maker of a note who has kept the debt against himself revived by partial payments may, on the payment of the note, obtain contribution from the other maker, notwithstanding that the payee's claim against the latter was barred. *Peaslee* v. *Breed*, 10 N. Hamp. R. 489.

[1] *Remington* v. *Stevens*, 2 Strange, 1271. But a debt otherwise barred may be a good set-off where there has been an express agreement that the debt should be carried on to the defendant's credit. *Smith* v. *Winter*, 12 C. B. 487. And see *Rawley* v. *Rawley*, L. R. 1 Q. B. D. 463.

[2] *Courtenay* v. *Williams*, 3 Ha. 539; 15 L. J. Ch. 204.

under an intestacy, on the ground that one of the next of kin of an intestate can take no share of the estate until he has discharged his obligation to it, and paid the debt in full.[1]

[1] *In re Cordwell's Estate*, L. R. 20 Eq. 644.

CHAPTER XXV.

EFFECT OF INSTITUTION OF ACTION.

Effect of decree.

Much doubt has been felt, and indeed remains, as to how far the institution of a suit will prevent time running against creditors other than the plaintiff. In *Sterndale* v. *Hankinson*,[1] it was decided that on a bill filed by one creditor on behalf of himself and all other creditors of the estate, all creditors who came in under the decree had an inchoate interest in the suit from the time of the filing of the bill, to the extent of its being considered as a demand by them, so that their debt would not be barred, though the decree itself was not made till the debt was six years old. Similarly in *O'Kelly* v. *Bodkin*,[2] it was held, that a creditor coming in and taking proper proceedings under a decree, may be considered as having adopted the suit *ab initio*. And it was considered that the fact that the bill was not in form filed on behalf of other creditors, as well as the plaintiff, was unimportant.[3]

Effect of decree.

These cases, which seem agreeable to common sense were, however, decided before the passing of

[1] 1 Sim. 393.

[2] 2 Ir. Eq. 361-70.

[3] Ibid., p. 369; but see *Watson* v. *Birch*, 15 Sim. 523.

the 3 & 4 Wm. 4, c. 27, and it is said that they are not applicable to cases within that Act since it has been passed.[1] And notwithstanding that Lord St. Leonards' remarks in *Bermingham* v. *Burke*,[2] that Courts of Equity should be cautious not to render it necessary for every creditor to file a bill upon his debtor's death, yet upon the authority of the cases,[3] it would seem that no creditor (one by simple contract perhaps excepted) can at present be advised that he can safely trust to the institution of a suit by any one but himself as a means to prevent the Statute running against his demand in the interval between the institution of the suit and his claim under the decree, though it seems probable that if such creditor be made a defendant to the suit, he will be protected from that date,[4] or if he bring in a claim under the decree from the date of his claim,[5] but the question requires further judicial interpretation. One point is, at all events certain, namely, that a creditor who comes in late under a

[1] *Berrington* v. *Evans*, 3 Y. & C. 384.

[2] 2 J. & L. 699.

[3] See generally on the subject, *Sterndale* v. *Hankinson*, 1 Sim. 393; *Berrington* v. *Evans*, 3 Y. & C. 384; *O'Kelly* v. *Bodkin*, 1 Ir. Eq. 434; *Carroll* v. *Davey*, 10 Ir. Eq. 321; *Bennett* v. *Bernard*, 12 Ir. Eq. 229; *Watson* v. *Birch*, 15 Sim. 523; *Humble* v. *Humble*, 24 Beav. 535; *Barrett* v. *Bermingham*, 4 Ir. Eq. 537; *Greenway* v. *Bromfield*, 9 Ha. 201; *Hutchings* v. *O'Sullivan*, 11 Ir. Eq. 443; and Sugden's R. P. Stat., p. 123.

[4] *Humble* v. *Humble*, 24 Beav. 535.

[5] *Greenway* v. *Bromfield*, 9 Ha. 201.

decree, and excuses his delay on the plea of ignorance of the existence of the suit, cannot claim to take advantage of it as regards the Law of Limitations.[1]

And a creditor may have so repudiated a suit as to be unable to take any advantage of it.[2]

It was decided in the Incumbered Estates Court in Ireland, in *In re Colclough*,[3] that an order for sale is made on behalf of all persons who have an interest in the proceeds, and that they are exonerated from taking any proceedings which would otherwise have been necessary to prevent the bar of the Statute.

In *Humble* v. *Humble*,[4] a mortgage was made in 1807, and a suit for the administration of the mortgaged estate was instituted in 1809, in ignorance of the existence of the mortgage. In 1841, the mortgage was discovered by the plaintiff, and the mortgagees were made parties for the first time to the suit. On further consideration in 1851 it was held that the mortgage was barred, inasmuch as the time had elapsed previously to 1841. And it was intimated by the Master of the Rolls, that though it might have been imprudent for the mortgagees to have taken any proceedings (because it would have been disadvantageous to realize the property), yet it

[1] *Berrington* v. *Evans*, 3 Y. & C. 370; *Carroll* v. *Darcy*, 10 Ir. Eq. 326.

[2] *Hutchings* v. *O'Sullivan*, 11 Ir. Eq. 443; *Carroll* v. *Darcy*, *ubi supra*.

[3] 8 Ir. Ch. 330.

[4] 24 Beav. 535.

was obligatory upon them to take means to prevent the Statute applying.

Duty of Chief Clerk.

In an Irish case, where a decree directed an account of debts due at intestate's death, and the Master himself raised the objection of the Statute as to debts barred between the death and the account, this course was considered incorrect.[1] On the other hand, if the Chief Clerk finds that a legacy is unpaid, it is equivalent to finding that it is due, and if the certificate is allowed to become binding, it is then too late to raise the objection of the Statute.[2]

[1] *Sterndale* v. *Hankinson*, 1 Sim. 395; see preceding Chapter.

[2] *Prowse* v. *Spurgin*, L. R. 5 Eq. 102. See *supra*, p. 236.

CHAPTER XXVI.

ACQUIESCENCE AND LACHES.

Acquiescence. THE doctrine of the Court of Chancery which prevented its interference in cases of acquiescence (as opposed to cases of laches) is illustrated in the often-quoted remarks of Lord Eldon in *Dann* v. *Spurrier*.[1] "This Court," says his Lordship, "will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement, a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw any objection in the way of his enjoyment"

Acquiescence. Similarly Lord Cottenham remarks, in the case of *The Duke of Leeds* v. *Amherst*,[2] that "if a party having a right stands by and sees another dealing with the property in a manner inconsistent

[1] 7 Vesey, 231. It is remarked by Kindersley, V.-C., in the case of the *Rochdale Canal Co.* v. *King*, that this important sentence is grammatically inaccurate.

[2] 2 Phillips, 123.

with that right, and makes no objection while the act is in progress, he cannot afterwards complain. This is the proper sense of the word acquiescence." A person can hardly be said to acquiesce unless he has a complete knowledge of all the facts in which he is alleged to have acquiesced.[1] Turner, L.J., remarks on this subject, in *Cooper* v. *Greene*,[2] a case of alleged acquiescence by a *cestui que trust*:—"Acquiescence, as I conceive, imports knowledge, for I do not see how a man can be said to have acquiesced in that he does not know, and in cases of this sort I think that acquiescence implies full knowledge, for I take the rule to be quite settled that a *cestui que trust* cannot be bound by acquiescence, unless he has been fully informed of his rights, and of all the material facts and circumstances of the case."

Imports knowledge.

Laches and acquiescence.

Laches and acquiescence are often inexactly used as identical in meaning. In fact, however, there is a great distinction between them. Laches is merely passive, while acquiescence implies almost active assent. And though Courts of Equity would doubtless, in cases to which no statutory limitation was applicable, in every way discourage laches and refuse relief after great unexplained delay, yet

[1] *Marker* v. *Marker*, 9 Hare, 16.

[2] 3 D. G. F. & J. 58. And see *Chalmers* v. *Bradley*, 1 Jac. & W. 59; *Lord Selsey* v. *Rhoades*, 1 Bli. N. S. 1; *Rudd* v. *Sewell*, 4 Jur. 882-86; *Hall* v. *Noyes*, cited at 3 Vesey, 748, and Anonymous case, cited at 6 Vesey, 632.

where there is such a statutory limitation, they will not anticipate it as they may where *acquiescence* has existed.

Laches amounts, in fact, only to that inferior species of acquiescence described in the following terms by the Vice-Chancellor Kindersley in *Rochdale Canal Co.* v. *King*:[1]—"Mere acquiescence (if by acquiescence is to be understood only abstaining from legal proceedings) is unimportant; where one party invades the rights of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive; unless, indeed, he continues inactive so long as to bring the case within the purview of the Statute of Limitations."[2] Mere lapse of time may, however, make the re-opening of a matter unreasonable.[3] Laches.

It appears that acquiescence will not be a bar in cases where there is an express trust. In *Browne* v. *Radford*,[4] which seems to be an authority for this proposition, the trust property had been improperly conveyed, but not for value, to the predecessor in title of the defendant upwards of 100 years before suit, and the plaintiff had discovered the facts 18 years before taking proceedings yet, on demurrer, it was held that the Statute had no operation.

[1] 2 Sim. N. S. 89.

[2] These remarks are erroneously attributed to Lord Cranworth by Lord Chelmsford, in *Archbold* v. *Scully*.

[3] *Green's Case*, 18 L. R. Eq. 428.

[4] W. N. 1874, p. 124.

But where a remainderman had looked on and allowed timber to be cut by the tenant for life, he was held to be barred of his remedy in less than 20 years,[1] and it is expressly provided as to realty by the 27th section of the principal Act, that the statutory limitation may be anticipated where there has been acquiescence.[2]

As regard laches on the part of an annuitant, where there have not been sufficient funds to pay the annuity, see the recent case of *Pitt* v. *Lord Dacre*.[3]

[1] *Harcourt* v. *White*, 28 Beav. 303.

[2] See Appendix, 3 & 4 Wm. 4, c. 27, s. 27.

[3] L. R. 3 Ch. D. 295. See also *Campbell* v. *Graham*, 1 Russ. & My. 453.

CHAPTER XXVII.

THE CROWN.

Except where it is expressly named, the Crown is not affected by the Statutes of Limitation, and the old Common Law maxim, *Nullum tempus occurrit regi*, will prevail.[1] And the same is the rule in America with regard to the rights of the Government.

Crown not barred by Statutes unless named.

The first attempt to limit the rights of the Crown in England was by Statute 21 of James 1, c. 5, entitled "An Act for the general quiet of the subject against all pretences of concealment whatsoever;" but inasmuch as that Act only gave protection where there had been possession adverse to the Crown for 60 years previously to the passing of the Act, it became of course, by efflux of time, continually less useful.

Statute of James I.

A more effectual remedy was provided by the *Nullum Tempus Act*, passed in the reign of George

By the Nullum Tempus Act the Crown barred as to realty.

[1] It has, however, been doubted whether the Statute 3 & 4 Wm. 4, c. 27, may not apply to the Crown, and the Nullum Tempus Act apply only to the private property of the Crown; but there is an express dictum of Romilly, M.R., to the contrary in *A.-G.* v. *Magdalen College*, 18 Beav. 246.

[2] Angell's Laws of Limitations, 5th ed., p. 28.

the Third.[1] By this the right of the Crown to recover any manors, lands, tenements, rents, tithes, or other hereditaments other than liberties and franchises, is barred after the lapse of 60 years from the commencement of such right. And there are provisions for the case of reversions and other future interests belonging to the Crown. Sometime subsequently a very similar Act was passed for Ireland.[3] By special recent Acts[4] provisions similar to those contained in the *Nullum Tempus Act* have been made in regard to the Duchy of Cornwall.

Similar Irish Act.

Duchy of Cornwall.

Subject matter of the Nullum Tempus Act.

It will be observed that the words in the Statute 9 Geo. 3, c. 16, are very general; but it has been doubted whether, and to what extent, they include advowsons, chattels real, and mines, and the exact nature of liberties and franchises there referred to.

Crown advowsons.

With regard to Crown advowsons, it has been argued that they are within the *Nullum Tempus Act*, as being included in the term "all hereditaments" contained in it. And also because in the 9th section of the same Act there is an express reservation of the Crown rights in the advowsons of the Savoy. On the other hand, it has been contended that the Act in question varied the Crown rights only when the subject of the claim had not

[1] 9 Geo. 3, c. 16. This Act is amended by the Statute 24 & 25 Vict., c. 62. See Appendix.

[2] Ibid.

[3] 48 Geo. 3, c. 47.

[4] 7 & 8 Vict., c. 105; 23 & 24 Vict., c. 53, and 24 & 25 Vict., c. 62.

been "put in charge," a mode of expression not applicable to advowsons.[1]

Exceptions in the Nullum Tempus Act.

In the Act of 9 Geo. 3, there were certain exceptions in favour of the Crown in cases where the title of the Crown had been acknowledged, by reason that the manor or other hereditaments had been in charge to the Crown or stood *insuper* of record, and also where as to a different part of the manor or other hereditaments in question the Crown's right had been preserved. These exceptions have been abolished by a recent Act,[2] and provision is made by the same Act, that where the Crown has made a lease of any manor or other hereditament, the right of the Crown against any person whose possession commences subsequently to the lease shall not be considered to accrue till the expiration of the lease.[3]

Removed by recent Acts.

Question whether the Nullum Tempus Act destroyed the remedy only.

It has been said that the remedy only of the Crown is barred by the *Nullum Tempus Act*,[4] and that the title is not transferred, and words of Lord Ellenborough in a case of *Goodtitle* v. *Baldwin*,[5] have been supposed (but perhaps without sufficient reason) to support this view.

The privilege of the Crown has been extended to a lessee of the crown out of possession more than twenty years.[6]

[1] *Gibson* v. *Clarke*, 1 Jac. & W. 159.

[2] 24 & 25 Vict., c. 62, ss. 1, 3.

[3] Ibid., s. 4. A similar Act was framed in the last session for Ireland. See Appendix, 39 & 40 Vict., c. 37.

[4] 9 Geo. 3, c. 16.

[5] 11 East, 488.

[6] *Doe* v. *Roberts*, 13 M. & W. 520. But see *Lee* v. *Norris*, Cro. Eliz. 331.

Crown may take advantage of Statutes not binding it.

Although the Crown is not affected prejudicially by any particular Statute of Limitation it may yet take the advantage of it.[1]

Independently of the Statute, a grant from the Crown may be presumed where the grant would not have been in excess of the prerogative. In *Goodtitle* v. *Baldwin*,[2] Ellenborough, C.J., remarked that it was the daily practice of the Courts to presume a grant of markets and the like upon an uninterrupted enjoyment of twenty years.

No grant can be presumed to have been made by the Crown against the express provisions of any Statute.[3]

No bar as to Crown debts.

In all cases where not specially named the Crown is not affected by Statutes of Limitation, consequently there is no limit to the time for the recovery of Crown debts. Though between the Crown and its immediate debtor the Statutes have no application,[4] yet when the Crown takes as assignee the rights of a subject, through a forfeiture or otherwise, there is more difficulty in the question. It seems that where the Crown has a derivative title it stands in the same position as its principal.[5] Thus, it has been considered that where the debt to the principal

Cases where Crown is assignee of a debt.

[1] 11 Co. 68 b. But see *Rustomjee* v. *The Queen*, L. R. 1 Q. B. D. 487.

[2] *Ubi supra*. See *Mayor of Hull* v. *Horner*, 1 Cowp. 102.

[3] *Goodtitle* v. *Baldwin*, 11 East, 488; *Doe* d. *Devine* v. *Wilson*, 10 Moore, 502.

[4] *The King* v. *Morrall*, 6 Price, 24.

[5] *Lambert* v. *Taylor*, 4 B. & C. 138.

is already barred, the transfer to the Crown will not revive it; but, if time is running against the principal, it will cease to run on the debt becoming vested in the Crown,[1] this being an exception to the general rule, that time having commenced to run will not stop.

Where Crown is a trader.

It was decided in an American case that a debt due to a State bank was due to the State, and consequently not barrable by the Statute.[2] On the other side it has been said to be a settled principle that, where a Sovereign becomes a member of a trading company, he divests himself to that extent of the prerogatives of Sovereignty and assumes the character of a private citizen.[3]

Petition of right.

It follows from what has been said that the Statute Law of Limitations does not affect Petitions of Right.[4]

[1] Ibid. This seems to be the law in America. See *United States* v. *White*, 2 Hill (N. Y. R.) 59, and Angell, 5th ed. 32.

[2] *State Bank of Illinois* v. *Brown*, 1 Scam. (Ill.) R. 106.

[3] Angell, 5th ed., p. 41.

[4] *Rustomjee* v. *The Queen*, L. R. 1 Q. B. D. 487.

CHAPTER XXVIII.

COMPUTATION OF TIME.

In calculating the various periods fixed by the different Statutes of Limitation, which date for the most part from the time of the accrual of the cause of action, a difficulty has sometimes arisen whether the day of such accrual ought to be excluded or included in the computation. Now, inasmuch as fractions of a day are not recognised in English law, the day must be either included or excluded in entirety.[1] As the law on this point is neither satisfactory nor certain, and as the question is one not belonging peculiarly to the subject of this work, it will suffice here to discuss the matter very briefly. The question was carefully considered, and the then existing authorities examined by Sir William Grant in *Lester* v. *Garland*.[2] The result of the learned judge's decision in that case seems to be that there is no settled general rule, and that the day of the event

[1] Notwithstanding the old maxim of law, yet the fiction that there is no fraction of a day will, it is said, no longer prevail, where it becomes essential for the purposes of justice to ascertain the exact hour or minute. *Pearpoint* v. *Graham*, 4 Wash. (U. S.) R. 232, and valuable remarks in Angell, 6th ed., cap. 6.

[2] 15 Vesey, 248.

in each case must be included or not, as may be most conducive to the beneficial operation of the particular Act, but that, however, where the act from which time is to commence to run is one to which the party who seeks to extend the period of the act is privy, then there is a presumption in favour of including the day of such act in the period.

Again in the case of *Pellew* v. *Hundred of Winford*,[1] Lord Tenterden said that it was impossible to reconcile all the cases, or to deduce from them any clear rule or principle. In an action on the Statute of Hue and Cry,[2] it was decided by a majority of the Court that the day of the robbery was to be included in computing the period within which it was necessary to bring the action. This was so decided partly on the ground that though the party robbed was deserving of relief and pity, yet as against the innocent Hundred the law was highly penal. Under the Statute 2 Geo. 2, c. 23, which directs that no solicitor shall commence an action for the recovery of his fees until the expiration of one month after he shall have delivered his bill it has been decided that the month is to be reckoned exclusively of the days on which the bill is delivered and the action brought.[3]

Meaning of the term "month."

In the absence of special circumstances which may lead to a contrary conclusion, a month at Com-

[1] 9 B. & C. 139.

[2] *Norris* v. *Hundred of Gautris*, Hobart, 139.

[3] *Blunt* v. *Heslop*, 8 A. & E. 577.

mon Law and in temporal matters is usually held to mean a lunar and not a calendar month. But now it is enacted by 13 & 14 Vict., c. 21, that in all *statutes* the word month shall be deemed and taken to mean calendar month, unless words be added which show that lunar month is intended. The effect of this Statute is, therefore, in regard to the construction of Acts of Parliament, to shift the onus of proof of the meaning of the term. But except so far as the Act extends, the term month still in temporal matters *primâ facie* means lunar month, though it is otherwise in ecclesiastical matters.[1] In mortgage transactions, too, a month means calendar month.[2] In considering what is the length of a calendar month, it is sufficient when the months are broken, whatever may be their length, to go from one day in one month to the corresponding day in the other.[3]

In *Mitchell* v. *Foster*,[4] it was decided that the expression "ten days' notice at least" in a Statute means ten clear days, exclusively both of the day on which proceedings are taken and of the day on which the cause arose.

[1] *Hipwell* v. *Knight*, 1 Y. & C. 401; *Parsons* v. *Chamberlain*, 4 Wend. (N. Y.) R. 512; Stephens' Bl., 7th ed., vol. i., 283; *Walker* v. *Clements*, 15 Q. B. 1046.

[2] Dav. Prec., 3rd ed., vol. ii, pt. 2, p. 863 (note *s*).

[3] Ibid.

[4] 4 Per. & Dav. 150.

CHAPTER XXIX.

THE CHURCH.

The rights of the bishops, clergy, and other spiritual persons, to recover land or rent in right of their benefices, are now chiefly regulated by the 29th section of the 3 & 4 Wm. 4, c. 27. They must be exercised within two incumbencies and six years or sixty years, whichever is the longer.

The section is as follows:—"Provided always, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit, to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit, shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice, in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the time of such two incumbencies and such term of six years taken to-

gether shall amount to the full period of sixty years, and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said 31st of December, 1833, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period."

Tithes.

There has been much doubt whether tithe rent-charge in the hands of a clergyman or other spiritual or eleemosynary corporation sole is included in this section. Tithes, moduses and compositions, in the hands of such a spiritual or eleemosynary corporation sole, are excepted by virtue of the interpretation clause of the Act.[1] They are, indeed, as chattel interests (that is to say, as between the landowner and the owner of the tithes and moduses), governed by the Statute 2 & 3 Wm. 4, c. 100; but, as regards the inheritance in them, they appear exempt from the operation of the Statute Law of Limitations. In fact, as between rival claimants to the inheritance in tithes, moduses, and compositions, the maxim, *Nullum tempus occurrit ecclesiæ* appears to survive.[2] It would seem indeed as if tithe rent-charge would be held to be on the same footing as tithes, moduses, and compositions,

[1] 3 & 4 Wm. 4, c. 27, s. 1. G. M. & G. 471.

[2] *Dean of Ely* v. *Bliss*, 2 D.

being strictly a tithe composition, so as to be governed by the Statute 2 & 3 Wm. 4, c. 100, as a chattel interest, and to be without statutory limitation as an inheritance; but the question has not, it is believed, been settled by authority, and it may be argued that it is within the Statute 3 & 4 Wm. 4, c. 27, s. 29, as between rival claimants to the inheritance.[1]

Tithes. In an Irish case it has been laid down that tithe rent charge clearly falls within either the term "land," or the term "rent," for the purposes of the 3 & 4 Wm. 4, c. 27,[2] but this view (if correct) does not dispose of the whole difficulty, inasmuch as tithe rent-charge belonging to an eleemosynary corporation sole, if it fall within the Statute as "land," on the ground that "land" is, by the interpretation clause to include tithes, would also fall within the exception mentioned as to tithes and moduses. If tithe rent-charge in the hands of a spiritual corporation sole, falls not under 3 & 4 Wm. 4, c. 27, but solely under the 2 & 3 Wm. 4, c. 100, it is not as an inheritance subject to any Statute of Limitation.

Advowson. The period within which a patron may recover his right to present to a benefice is regulated by section 30 of the Statute 3 & 4 Wm. 4, c. 27, and is fixed to be the period of three adverse incum-

[1] *Dean of Ely* v. *Bliss*, 5 Beavan, 574; Darby & Bosanquet, 377.

[2] *Shiel* v. *Incorporated Society*, 10 Ir. Eq. R. 416.

bencies, or of sixty years, whichever is the longer. The section is as follows:—"That after the said 31st of December, 1833, no person shall bring any *quare impedit* or other action, or any suit, to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies, will make up the full period of sixty years."

It is to be observed that the old doctrine of adverse possession is revived for the purposes of this section.

By section 31 of the same Act,[1] in cases where the Crown or the ordinary *after a clerk has obtained possession of a benefice adversely* presents or collates a clerk thereto by reason of a lapse, such last-named clerk is to be considered to have obtained possession adversely to the patron; but

[1] See Appendix.

where a clerk is appointed by the Crown to a benefice vacant by the appointment of the incumbent to a bishopric, the incumbency of such clerk is to be considered a continuation of that of the incumbent so made bishop.

Meaning of term "advowson."

In modern times, and in ordinary language, the term advowson is confined to mean the perpetual right of presentation to a church or other ecclesiastical benefice.[1]

Meaning of term "spiritual corporation."

A benefice is not made spiritual because it can only be held by a person in holy orders; it is the object for which it is established which makes it a spiritual or lay foundation; if a hospital be established for the relief of the poor, and if there be no cure of souls attached to it, it is a lay foundation.[2]

It seems that the Statute would not apply to benefices of a higher grade than those enumerated in it; as the general words of a Statute beginning with inferior persons do not extend to superior persons.[3]

[1] *Attorney-General* v. *Ewelme Hospital*, 17 Beav. 383.

[2] Ibid.

[3] *Archbishop of Canterbury's Case*, 2 Co. Litt. 46 b; *Lowther* v. *Lord Radnor*, 8 East, 115; *Casher* v. *Holmes*, 2 B. & Ad. 592.

CHAPTER XXX.

BANKRUPTCY.

Debts barred not proveable.

DEBTS barred by any Statute of Limitation are not proveable in bankruptcy; they can be objected to by the debtor or any creditors, and may be expunged,[1] and dividends received thereon by a creditor have been ordered to be refunded.[2] The purpose of a commission of bankruptcy is described by Lord Eldon as being to work out the payment of those creditors who could by legal action or equitable suit have compelled payment.[3]

It is the duty of assignees or trustees in bankruptcy, to set up the bar of any Statute of Limitation. There is in this respect no analogy between their position and that of an executor; and it is their duty to pay with perfect fairness the debts owing by the bankrupt. They are, in fact, trustees for the general body of the creditors, and it is not only their right, but their bounden duty to rely on the Statute.[4]

[1] *Ex parte Dewdney*, 15 Ves. 479; *Mavor* v. *Payne*, 3 Bing. 285; *Ex parte Kidd*, 7 Jur. N. S. 613.

[2] 2 Rose, 59 (note *a*); *Ex parte Roffey*, 2 Rose, 245.

[3] *Ex parte Dewdney, ubi supra.*

[4] *Per* Macan, J., *In re Clendinning*, 9 Ir. Ch. Rep. 284.

How far debt barred may be ground for petition.

There is now no doubt (though the question was at one time considered uncertain) that a debt barred by the Statute Law of Limitations, cannot be a ground for a petition of adjudication *if the debtor intended to be made bankrupt raise that defence.*[1] By the Bankruptcy Act, 1861, s. 97, indeed, it was expressly enacted that debts barred by any Statute of Limitation should not be reckoned as debts for the purpose of such a petition, but there appears to be no enactment to that effect in the present Bankruptcy Act.[2] It is, indeed, frequently laid down that such a debt cannot be ground for a petition,[3] even though the debtor do not object; but it is submitted that practically no one could dispute the validity of proceedings grounded on such a petition,[4] and that though other creditors may, as we shall see, object to the proof of other debts barred by any Statute, yet that by analogy to the rule obtaining in the case of a creditor's administration suit,[5] they could not object to proof of the debt of the petitioning creditor. It has been held that debtors to the bankrupt's estate could not, in an action against them by assignees in bankruptcy, dispute the validity of the proceedings on the

[1] *Ex parte Dewdney*, 15 Ves. 479; *Mavor* v. *Payne*, 3 Bing. 285; *Quantock* v. *England*, 2 Blackst. 702; *In re Clendinning*, 9 Ir. Ch. Rep. 284.

[2] 32 & 33 Vict., c. 71.

[3] See Robson's Bankruptcy, 2nd ed., p. 161.

[4] *Mavor* v. *Payne*, 3 Bing. 285.

[5] See *supra*, p. 237.

ground that the debt of the petitioning creditor was barred.[1]

It seems that the Law of Limitations ceases to operate after bankruptcy, and that time will not run as to debts of creditors not at the commencement of the bankruptcy already barred; the effect of bankruptcy is to vest the property in the trustees as such for the benefit of the creditors, and debts are not afterwards affected by lapse of time.[2]

And it would seem that the date of the act of bankruptcy is the date to be considered for this purpose.[3]

Admissions by a bankrupt before bankruptcy may be binding on his property, but after bankruptcy he cannot so affect the estate.[4]

Payment of dividends in bankruptcy will not revive a debt.[5] It was said by Alderson, B., in *Davies* v. *Edwards*,[6] that such payments did not amount to an admission that the debt was due, coupled with a promise to pay the remainder. And in another case, Campbell, L.C., said, that the

[1] *Mavor* v. *Payne, ubi supra*; *Swayn* v. *Wallinger*, 2 Str. 746.

[2] *Ex parte Ross*, 2 G. & J. 330; *Sterndale* v. *Hankinson*, 1 Sim. 393. See, however, *Gray* v. *Mendez*, 1 Str. 556. A commission in a foreign country will not stop the Statute. *Ex parte Kidd, ubi supra.*

[3] *Ex parte Dewdney*, 15 Ves. 491.

[4] *Smallcomb* v. *Bruges*, McCleland, 45.

[5] *Brandram* v. *Wharton*, 1 B. & Ald. 463; *Davies* v. *Edwards*, 7 Ex. 22; *Ex parte Topping*, 34 L. J. Banktcy. 44.

[6] *Ubi supra.*

law could not infer a promise to pay a debt from admission of it, where there is a declaration by the debtor at the same time that he is unable to pay it in full.[1]

The insertion of a debt in the schedule to a deed of inspectorship executed for the purpose of administering the estate of a creditor, although the schedule was verified by the debtor's affidavit, was held not to amount to a sufficient acknowledgment, so as to take the debt out of the Statute of Limitations, under a subsequent administration of the debtor's estate in bankruptcy. Neither was payment by the inspectors of a dividend upon the debt held to be a sufficient part payment. The debtor's affidavit in such a case was characterised by Cranworth, L.C., as amounting only to an admission that the debt was due *modo et formâ*.[2]

A payment expressed to be on account of a composition of five shillings in the pound, did not revive the remedy for the whole debt on the composition not being paid.[3]

Cestuis que trustent may prove against a bankrupt's estate for trust-money which was knowingly in the bankrupt's possession, though otherwise the debt would have been barred.[4]

[1] But see *Eicke* v. *Nokes*, 1 Moo. & P. 358; *Collis* v. *Stack*, 1 H. & Norm. 605.

[2] *Ex parte Topping*, 13 W. R. 1025.

[3] *Ex parte Bateson*, 1 M. D. & D. 289.

[4] *Ex parte Gowers*, 2 Deac. 207.

CHAPTER XXXI.

CHARITIES.

Charities are within the Statute.

CHARITIES are within the Statute 3 & 4 Wm. 4, c. 27. Under previous Acts, when Courts of Equity were not *eo nomine* bound, and followed the statutory limitations, only by way of analogy, an exception was allowed in favour of charities—an exception which, though intended for the public benefit, was often in reality productive of hardship.[1] Charities are not expressly named in the 3 & 4 Wm. 4, c. 27, but it has now been decided that they are within its scope. They are, in fact, trusts, though in some respects trusts of a favoured nature, and as such are within sections 24 and 25 of the Act.[2] The recipients of a charity are really mere *cestuis que trustent*, and a purchaser for value from their trustees, whether with or without notice of the trust, is safe at the expiration of the proper term, in the same manner as if he had purchased from ordinary trustees.[3]

[1] *Attorney-General* v. *Magdalen College*, 6 H. L. 189.

[2] Ibid.; *Attorney-General* v. *Davey*, 4 D. G. & J. 521; *Incorporated Society* v. *Richards*, 2 Dru. & Wal. 67; *Commissioner of Charitable Donations* v. *Wybrants*, 2 J. & Lat. 182.

[3] *Attorney-General* v. *Magdalen College*, Ibid., p. 216.

The recipients of the charity will of course still retain their remedy against the trustees.[1]

The Attorney-General, in appearing on behalf of a charity, is only part of the machinery by which the rights of others are sought to be enforced, and the real litigants are the rightful recipients of the charity.[2] The Attorney-General.

The "poor" of a parish are a class of persons within the meaning of the 1st section of the Act.[3] The "poor."

The decision of the House of Lords in the case of the *Attorney-General* v. *Magdalen College*,[4] which decided that a purchaser for value from the trustees of a charity could take advantage of the Statute, was held to govern a case where the property in question had not been aliened in fee, but had been leased for a term of 500 years, and the rent on which had been regularly paid.[5]

[1] *Attorney-General* v. *Magdalen College*, 2 J. & Lat. 182.

[2] Ibid.

[3] Ibid.

[4] *Ubi supra.*

[5] *Attorney-General* v. *Davey*, 4 D. G. & J. 136; *S. C.*, 19 Beav. 521. But see the recent case on demurrer of *Magdalen Hospital* v. *Knotts*, reported in *The Times* of Dec. 12, 1876. In this case the defendants held certain premises under a long lease granted so far back as the year 1783, which lease was admitted to be void or voidable under the Statute of 13 Elizabeth, cap. 10. In overruling the demurrer Sir George Jessel, M.R., said that it was a case of great hardship. He should have been very glad to decide in favour of the defendants, and he hoped that it was not wrong to wish that another Court might see its way to reversing his decision. The defendants held the property from which it was sought to eject them

A breach of trust by misapplying charitable funds is in strictness never barred,[1] but in cases

[1] *Attorney-General* v. *Corporation of Exeter*, Jacob, 448; 2 Russ. 45; *Attorney-General* v. *Newbury*, 3 M. & K. 647; *Attorney-General* v. *Brewer's Co.*, 1 Mer. 498.

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under a 99 years' lease granted by the charity in 1783, apparently for valuable consideration and at a peppercorn rent. Whether the transaction was improvident or not he need not stop to consider at this distance of time. This was certain—that the property had been ever since held and enjoyed under that lease, which would not expire until 1882, and then the reversionary term of 50 years would come into existence. The plaintiff's case was that this lease was void under the Statute of Elizabeth. That it was void for this reason was clear; and then the question was whether the Statute of Limitations—a most beneficial statute—was a shield to the defendants. He was sorry to be obliged to hold that it was not. In order to get the benefit of the Statute of Limitations the defendants must show adverse possession for a period of 20 years prior to the time when the right to bring an action of ejectment first accrued. When did that right first accrue? If at the time when the lease was granted, then the plaintiffs were out of court; but if not, then when did it first accrue? He was compelled to come to the conclusion that the lease was not void under the Statute of Elizabeth, but voidable, and consequently that the right first accrued when the plaintiffs elected to avoid it—in other words, when the writ of summons issued in the present action. If leases such as this were void *ab initio*, as the defendants' counsel had been forced to argue, then a bishop or a rector might grant a lease at a peppercorn rent to a tenant who, at the expiration of 20 years, would be able to hold the premises in fee-simple as against the Church for ever. The mere statement of such a proposition was shocking to one's intellectual perceptions, when one considered for what objects the Statute of Elizabeth

where parties have only followed the custom of their predecessors, then, if they behave well and do not resist, they may be saved as much as possible from a bygone account.[1] Indeed, if the administration of the funds, though mistaken, has been innocent and unconnected with any corrupt purpose, the Court, while it directs for the future, refuses to visit with punishment what has been done in times past.[2]

was enacted. The only natural conclusion was that such leases were voidable, but not void. It had been decided by the Court of Exchequer—*Pennington* v. *Cardale*, 3 H & N. 666—that such was the effect of the disabling and restraining Statutes of Elizabeth. Besides, how could the man whose predecessor in title had taken a lease, turn round and say it was void? In the common case of a proviso that in certain events a lease should be void, it had never been decided that the tenant could claim the benefit of the proviso, which was meant for the landlord only. His Lordship then overruled the demurrer accordingly. See *S. C.*, Weekly Notes, 23 Dec., 1876.

[1] *Attorney-General* v. *Pretyman*, 4 Beav. 462.

[2] *Per* Eldon, C., in *Attorney-General* v. *Corporation of Exeter*, *ubi supra*.

CHAPTER XXXII.

TORTS.

In torts time runs from date of tort;

In the case of torts arising *quasi e contractu*, the Statute usually commences to run from the date of the tort, not from the occurrence of actual damage. And ignorance of the facts on the part of the plaintiff will make no exception to the rule, though he discover his injury too late to have a remedy. This will be the case, too, even where the defendant has betrayed the plaintiff into permitting the time to elapse in fruitless inquiries and negotiations.[1]

It is, however, said that there may be cases where the injured party may bring trespass or trover, or may waive both, and bring assumpsit for the proceeds of the property when it shall have been converted into money, and in the last case the tortfeasor cannot allege his own wrong so as to bring time back to the day of the tort.[2]

[1] *East India Co.* v. *Paul*, 7 Moo. P. C. C. 85. See as to directors of insolvent bank, the American case of *Hinsdale* v. *Larned*, 16 Mass. R. 68.

[2] *Lamb* v. *Clark*, 5 Pick. (Mass.) R. 193. But there must be an actual conversion: *Jones* v. *Hoar*, Ib., 285. See *Lamine* v. *Dorrell*, 2 Ld. Raymond, 1216; *Hitchin* v. *Campbell*, 2 W. Bl. 827; *Hambly* v. *Trott*, Cowp. 371.

An important distinction exists between actions arising from torts and upon assumpsit, in that the right to the former cannot be revived by acknowledgment.[1] and remedy cannot be revived by acknowledgment.

Although, as has been seen, time commences usually to run in a defendant's favour from the time of his wrongdoing, and not from the time of the occurrence to the plaintiff of any consequential damage, yet it is necessary for the truth of this proposition that the wrongdoing should be one for which nominal damages might be immediately recovered. Not every breach of duty creates an individual right of action. And a distinction something similar to that which has been drawn by moralists between duties of perfect and imperfect obligation may be observed in duties arising from the law. In this way a breach of public duty will not inflict any direct immediate wrong on an individual; and neither his right to a remedy, nor his liability to be precluded by time from its prosecution, will commence till he has suffered some actual inconvenience. While it is otherwise, as has been noticed, where there is a private relation between the parties, where the wrongdoing of one at once creates a right of action in the other. In fact, when the injury, however slight, is complete at the time of the act, the statutory period then commences, but when the act is not legally injurious until certain When time begins to run.

[1] *Hurst* v. *Parker*, 1 B. & Ald. 92; *Tanner* v. *Smart*, 6 B. & Cress. 603.

consequences occur, the time commences to run from the consequential damage.[1] And in a case where the plaintiff had been damaged by the cutting away of certain pillars of coal which supported the surface, and which was ultimately injured in consequence, it was considered that time commenced to run against the plaintiff on the occurrence of the damage, and not from the date of the removal of the pillars.[2]

In an action for maliciously opposing the discharge of an insolvent debtor, time was considered to run from the date of the opposition, and not from the cessation of imprisonment.[3]

In *Nicklin* v. *Williams*, Parke, B., referring to the above cases as to consequential damage, said, "It remains to consider some cases cited and much relied on showing that the limitation of actions under particular Statutes directed to be brought

[1] See judgment of Story, C.J., in the American case of *Bank of Hartford Co.* v. *Waterman*, 26 Conn. 324, which is given verbatim in Angell, 6th ed., 142, n. 3. See also *Roberts* v. *Read*, 16 East, 215; and *Gillon* v. *Boddington*, 1 Car. & P. 541; and see *Whitehouse* v. *Fellowes*, 10 C. B. N. S. 765; and *Denys* v. *Shuckburgh*, 4 Y. & C. 42. See also *supra*, on solicitor's negligence.

[2] *Bonomi* v. *Backhouse*, 5 Jur. N. S. 1345; 28 L. J. Q. B. 378; 9 H. L. 503. This case was decided on appeal by Lords Westbury, Brougham, Cranworth, Wensleydale, and Chelmsford, with the assistance of six of the judges.

[3] See *Nicklin* v. *Williams*, 10 Ex. 259; *Violett* v. *Sympson*, 8 El. & Bl. 344; 27 L. J. Q. B. 138.

within a certain time 'from the fact committed,' dated from the period when consequential damage was occasioned, and therefore it was said that the damage was the cause of action. These Statutes mean no doubt the limitation to run from the act, that is the cause of action. But on examining these cases they do not appear to be for injuries to rights which this is, but solely for *consequential damages*, where the original act itself was no wrong and only became so by reason of those damages."

CHAPTER XXXIII.

MISCELLANEOUS.

Solicitor's costs.

As long as an action is going on a solicitor is bound to attend to it, and cannot sue for his costs, though he may in some cases require a reasonable advance on their account. Consequently, as a rule time will not commence to run against any items of a solicitor's bill until his retainer is concluded, either by the termination of the action or matter, or by notice from, or death of, his client.[1]

But continuous employment out of Court, as for instance, in endeavouring to raise money on behalf of a client, may not be a continuous employment within this principle.[2]

And it seems that the time when a solicitor can recover his fees is when a suit is terminated by a sentence given and then time begins to run, notwithstanding that some further charges incidental to the matter may be incurred afterwards.[3]

Where a lunatic died in June, 1853, and the

[1] *Whitehead* v. *Lord*, 7 Ex. 691; *Harris* v. *Osbourn*, 2 C. & M. 629; *Martindale* v. *Falkner*, 2 C. B. 706.

[2] *Phillips* v. *Broadley*, 9 Q. B. 744; 16 L. J. Q. B. 72.

[3] *Per* Lord Tenterden, in *Rothery* v. *Munnings*, 1 B. & Ad. 15.

solicitor in the lunacy obtained an order for taxation of his costs in the lunacy in February, 1854, under the 23 & 24 Vict., c. 127 (Attorneys and Solicitors Act), and the taxation was completed in February, 1855, on the solicitor presenting a petition for an order to charge the lunatic's estate under section 29 of the last-named Act, it was held by Knight-Bruce, L.J., that the right to recover accrued on the death of the lunatic, and by Turner, L.J., that it accrued on the order for taxation being obtained, and as more than six years had in either case elapsed since the accrual of the right to recover, it was held that the petitioner's claim was barred by the concluding provision of the 29th section.[1]

Advertisement for creditor.

If a debtor, whose debt has become barred by lapse of time, or if he is dead, his personal representative advertise for creditors in the "Gazette" or other newspapers, it will, it seems, depend on the wording of the advertisement, whether it amounts to an acknowledgment so as to revive the debt or not. If the advertisement contains a promise to pay all persons on application who have debts owing to them by the advertiser, it will amount to a sufficient acknowledgment to exclude the Statute.[2] But

[1] This provision is as follows:—"Provided always, that it shall not be lawful for the Court or Judge to make any such order but within six years next after the right to recover such costs, charges, and expenses shall have accrued."

[2] *Andrews* v. *Brown*, Prec. in Ch. 385; *Jones* v. *Scott*, 1 R. & M. 255-70; *Scott* v. *Jones*, 4 Cl. & Fin. 382.

it seems that an advertisement (in the form usual, for instance, in advertising, under 22 & 23 Vict., c. 35), only requesting persons having claims against the debtor's estate to submit them for examination, will not suffice to exclude the operation of the Statute.[1]

Mesne profits.

In equity as well as at law, in absence of any special circumstances to the contrary, a trespasser in possession of the estate of another must account for the mesne profits for the whole time he has been in possession, so far as the account is not barred by any express Statute. But such circumstances are readily assumed; and where the defendants have been in justifiable ignorance of plaintiff's title, the account will usually only be taken from the date of the filing of the bill.[2] In an adverse suit in the nature of an ejectment bill, the account is directed only from the filing of the bill, but in a suit against a person in a fiduciary character the account is taken either from the original period, or if the Court thinks so fit, on account of the plaintiff's laches, for the six years only previous to the filing of the bill.[3] But this is so only in cases where there is, to quote the words of Turner, L.J.,

[1] *Jones* v. *Scott*, 1 R. & M. 255.

[2] *Dormer* v. *Fortescue*, 3 Atk. 124; *Pettiward* v. *Prescott*, 7 Ves. 541; *Bowes* v. *East London Waterworks*, 3 Madd. 375-83; *Attorney-General* v. *Corporation of Exeter*, 2 Russ. 45; *Clarke* v. *Yonge*, 5 Beav. 523.

[3] *Per* Wood, V.-C., in *Thomas* v. *Thomas*, 2 K. & J. 79.

"no fraud, no suppression, no infancy,"[1] and in cases of infancy, therefore, an account may be claimed from the original period.

Copyright. The 26th section of the *Copyright Act* (5 & 6 Vict., c. 45) does not apply so as to prevent a suit for an injunction to restrain a piracy of copyright by sale of a book published more than twelve months before bill filed.[2]

Casus omissus. There occurs occasionally, as we have from time to time seen, a *casus omissus* in the existing Statutes. It is said that these accidental omissions can in no way be supplied by a Court of law, inasmuch as to do so would be to make laws.[3]

Infancy. The rule by which a father or relation in possession of an infant's estate is treated as a guardian or bailiff for the infant, depends upon the more general rule, which requires that no possession shall be considered as adverse which may possibly be consistent with the lawful title.[4]

Pendency of suit. The time of the pendency of a suit in equity has been directed not to be taken advantage of at law.[5]

Guardians' balance. When the guardian of an infant makes up the

[1] *Hicks* v. *Sallitt*, 3 D. G. M. & G. 782-801.

[2] *Hogg* v. *Scott*, L. R. 18 Eq. 444.

[3] *Lane* v. *Bennett*, 1 M. & W. 70. See 1 T. R. 72. And see *Alsop* v. *Bell*, 24 Beav. 451; and *Humble* v. *Humble*, 24 Beav. 535.

[4] "Possession is never considered adverse if it can be referred to a lawful title," *per* V.-C. Wood, in *Thomas* v. *Thomas*, 2 Kay & J. 79. See *Doe* d. *Milner* v. *Brightwen*, 10 East, 583.

[5] *Sturt* v. *Mellish*, 2 Atk. 614; *Anon.*, 1 Vern. 73, 74.

accounts of the infant's estate on the attainment of twenty-one years, and exhibits a balance due from himself, he ceases to be a trustee of the amount, and time runs in his favour from that date.[1]

Bank notes.

Bank notes are not expected to be paid until given up by the holder, so that they are not affected by the laws of limitation.[2]

Power of sale.

A power of sale is not within the mischief or spirit of the Acts.[3]

Public highway.

No title can be gained by the Statute against a public highway. "Once a highway always a highway," is an established maxim, and the public cannot release their right.[4]

Slander.

Actions upon the case for words actionable in themselves must be brought within two years, but it seems where they are actionable only by reason of special damage, they may be brought within six years.[5]

Loan by wife to husband.

If a *feme covert*, having money for her separate use, lend to her husband, owing to the unity of person existing in law, the Statute will not begin to run till the husband's death.[6]

Cause of action given by new Statute.

Where a cause of action, not existing previously, is given by a new Act, it has been held in America

[1] *Green* v. *Johnson*, 3 Gill & Johns. (U. S.) R. 387.

[2] *Hinsdale* v. *Larned*, 16 Mass. R. 68.

[3] *Mason* v. *Broadbent*, 30 Beav. 296.

[4] *Dawes* v. *Hawkins*, 8 C. B. N. S. 858. And Cf. Code Civil., 2226.

[5] Blansh. 99. See *Bonomi* v. *Backhouse*, 9 H. L. 503.

[6] *Towers* v. *Haghner*, 3 Whart. (Penn.) R. 48.

that time elapsed previously to the passing of the Act can form no bar.[1]

Railway deposits.

Where, under certain railway Acts certain moneys deposited in the Court of Chancery were to be applied as assets of a railway company, the project of which was abandoned, the costs of obtaining the special Act were allowed to be paid out of the deposit, though they had been incurred fourteen years previously.[2] There had been in fact no assets of the company till the return of the deposit, and upon this, and the wording of the special Act, the decision of Malins, V.-C., principally turns. The subject is, however, one of considerable importance, as the principles on which the judgment is founded are of wide application; and an extract from the judgment, from which the facts of the case sufficiently appear, is given accordingly:—

"Now what was the situation of these gentlemen (the applicants)? Up to the 14th of May, 1873, it is perfectly clear there was not an asset of the company which could possibly pay them. If, therefore, the question depended entirely upon the Companies Clauses Act, it seems to me that the Statute of Limitations is excluded because there is, as I read the section, a continual obligation on the company out of their first assets to pay the expenses of obtaining the Act of Parliament. That obligation does not cease because they do not have assets for a con-

[1] *Leasure* v. *Mahoning Township*, 8 Watts' (Penn.) R. 551.

[2] *In re Kensington Station Act*, L. R. 20 Eq. 197.

siderable time. It happened in this case that they had no assets for fourteen years. Suppose they had had assets immediately after the expiration of six years, why is the debt to be barred? It is to be paid out of the first assets and the money is to be applied first in payment of these expenses. How can the Statute of Limitations run against parties who do not apply for payment when they know that there is nothing to pay them with? I quite agree that in the case of a man owing a debt, the Statute of Limitations is not saved because he has no means of paying. Whether he can pay or not there the debt is incurred and the Statute begins to run. But in this case the Statute of Limitations has no application till the period arrives when there is something to pay with. They are to pay the expenses out of the first moneys they receive. They had the first money on the 14th of May, 1873; and then, and in my opinion not till then, the Statute of Limitations began to run.

"That conclusion rests upon principle and also upon authority. I refer to *Carden* v. *General Cemetery Company*.[1] Mr. Carden was the promoter of cemeteries generally, and particularly of the cemetery at Kensal Green. He incurred very considerable expenses in establishing that cemetery, or rather in obtaining the Act of Parliament for it. He brought an action against the Company after its incorporation for payment of those expenses and his

[1] 5 Bing. N. C. 253.

costs. His case rested upon the 20th section of the Act which enacted 'That all the money to be raised by the company by virtue of this Act shall be laid out and applied, in the first place, in the payment of and discharging all costs and expenses incurred in applying for obtaining and passing this Act, and all other expenses preparatory or relating thereto, and the remainder of such money shall be applied in and towards purchasing lands, tenements, and hereditaments,' and for other purposes. There, like the present case under the general Act, he had no right to be paid until there was money due to him. He was to be paid out of the first moneys. An objection was taken to his action that he did not aver that there were moneys. If he was bound to bring his action within six years, why was he to make the averment?" Chief Justice Tindal in giving judgment says:[1]—"It was next objected on the part of the defendants that the declaration does not state that the defendants had any money in their hands at the time the plaintiff demanded his debt, or at all events that they had sufficient in their hands to satisfy the demand of the plaintiff. And if this objection had been made the ground of a special demurrer to the declaration, it might perhaps have been held that the allegation was insufficient for that purpose. But the declaration does in fact allege that the company, after the passing of the Act, under and by

[1] 5 Bing. N. C. 259.

virtue of the Act, did receive divers sums of money out of which they might and ought to have paid and satisfied the plaintiff, and we think this amounts in substance to an averment that the company had enough to satisfy the plaintiff's demand, and therefore is sufficient upon a general demurrer." What is the fair result of those observations of the Lord Chief-Justice? That if he brought his action at any time without being able to aver that they had money the action would fail. If, until he can aver that, he has no right to bring an action, then the Statute must run from the time when he is in a situation to maintain an action. If it is a condition precedent to bringing an action that a man must aver there are funds out of which he can be paid, then the time begins to run only when that state of thing exists which entitles him to maintain an action; and that state of things does not exist until he can aver in his declaration that the defendants have money in their hands wherewith he can be paid. So far as it depends upon the general Act—The Company's Clauses Act—it was a condition precedent to the plaintiff being able to maintain an action, and if an action then a suit in this Court, that he should aver that the time had arrived when the defendants had assets in their hands; and as soon as they have assets in their hands his right arises, and from that time only the Statute begins to run.

Dignities.

Dignities without emoluments attached, such as are peerages and titles of honour are not within any

Statute of Limitation.[1] But offices of dignity, which are accompanied with the right to fees and emoluments, such as is the office of Lord Chamberlain are within the Statute Law.[2] Offices of profit.

The case of persons having privilege of Parliament is the subject of special enactments; except as to freedom from arrest they are much in the same position as other persons.[3] Privilege of Parliament.

Where an action abated by the marriage of a feme sole, a reasonable time was allowed afterwards for the plaintiff to commence a new action, though the statutory time expired in the interval; and it is reasonable to suppose that a similar indulgence would be granted in cases of abatements from other causes.[4] Abatement.

The Court of Admiralty, though following the law, as did equity, is not bound by the Statute of James.[5]

It has been held that suits in Spiritual Courts are not within the Statute Law of Limitations, such for instance as a proceeding *pro violantâ manuum injectione super clericum*, inasmuch as the proceeding is one *pro reformatione morum* and not for damages,[6] but now all suits for property in Ecclesiastical Spiritual court.

[1] Blansh. 56.

[2] Blansh. 52.

[3] See 12 & 13 Wm. 3, c. 3; 45 Geo. 3, c. 124; Blansh. 209.

[4] Blansh. 114; *Curlewis* v. *Mornington* (*Earl of*), 7 El. & Bl. 283; 27 L. J. Q. B. 439.

[5] *Ewer* v. *Jones*, 6 Mod. 25. See under Seamen's Wages.

[6] Blansh. 211. Such suits are also regulated in this respect.

Courts are regulated by the 43rd section of the Statute 3 & 4 Wm. 4, c. 27. The section is as follows:—"After the said thirty-first day of December one thousand eight hundred and thirty-three, no person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any Spiritual Court to recover the same, but within the period during which he might bring such action or suit at law or in equity."

Renewal of writ.

Formerly, the Statute Law of Limitations might have been defeated for an indefinite time by continually renewing a writ without service; but now, under the Judicature Act, 1875, Order VIII., a writ can only be renewed if reasonable efforts have been made to serve the defendants.[1] The order is as follows:—

"No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith the plaintiff may, before the expiration of the twelve months, apply to a judge or the district registrar for leave to renew the writ, and the judge or registrar, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent summons be renewed for

[1] Wilson's Judicature Acts, 174.

six months from the date of such renewal, and so from time to time during the currency of the renewed writ * * * and a writ of summons so renewed shall remain in force and be available to prevent the operation of any Statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

In a recent case, where a plaintiff had issued a writ against the defendant in the Court of Common Pleas, on the 7th of January, 1875, but no notice had been given to the defendant, and on the 6th of July, 1875, within six months from the issuing of the writ an administration summons was issued to administer the estate of the defendant's testator in Chancery, the Court held that the commencement of proceedings by the writ in the Common Pleas only kept the debt alive as regarded that particular Court, and the administration summons was not a proper renewal of the writ so as to defeat the Law of Limitations.[1]

The institution of proceedings which are presumed to have been unsuccessful will not suspend the operation of the Statute.[2]

Where a person is out of the jurisdiction, and the bill prayed process against him when he returned, the Statute was considered to have been suspended

[1] *Fievet* v. *Manby*, W. N. 1876, p. 160.

[2] *Barker* v. *Buttress*, 7 Beav. 134.

as against him, though he had not been served nor appeared to the suit.[1]

Justices of the Peace.

Justices of the peace are protected, as to acts done in the execution of their duty after six months, by the 11 & 12 Vict., c. 44, s. 8.

Constables.

Constables are similarly protected by the same section. In both cases, a question may arise as to how far the acts complained of were done *bonâ fide* in execution of the defendant's duty.[2]

The colonies.

Colonial lands are not bound by English Statutes unless expressly named, or unless the colonial Legislature re-enacts the Statutes. Consequently it was held, in a very recent case, by Hall, V.-C., that annuities, which were given out of an estate in Jamaica, were recoverable after a period, when, in consequence of the Statute 3 & 4 Wm. 4, c. 27, they would not have been recoverable out of an estate situate in England, there being no corresponding Statute of Limitation applicable to Jamaica.[3]

[1] *Hele* v. *Lord Bexley*; *Whitfield* v. *Bowyer*; *Whitfield* v. *Knight*, 20 Beav. 127.

[2] *Gosden* v. *Elphick*, 4 Ex. 445; *Haseldine* v. *Grove*, 3 G. & D. 210; *Barnett* v. *Cox*, 1 Q. B. 617; *Massey* v. *Johnson*, 12 East, 67.

[3] *Pitt* v. *Lord Dacre*, L. R. 3 Ch. D. 295.

APPENDIX OF STATUTES.

(ARRANGED IN CHRONOLOGICAL ORDER.)

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21 James 1, cap. 16, ss. 3, 4, 7. (Simple Contracts.)
4 Anne, cap. 16, ss. 17, 18, and 19. (Seamen's Wages.)
9 Geo. 3, cap. 16. (The Crown.)
9 Geo. 4, cap. 14, ss. 1, 2, 3, 4, and 8. (Lord Tenterden's Act.)
3 & 4 Wm. 4, cap. 27. (Real Property.)
3 & 4 Wm. 4, cap. 42, ss. 3 to 7. (Specialties).
7 Wm. 4 & 1 Vict. cap. 28. (Mortgages.)
16 & 17 Vict. cap. 113, ss. 20 to 27. (C. L. P. Amendment Act, Ireland.)
19 & 20 Vict. cap. 97, ss. 9 to 16. (Mercantile Law Amendment Act.)
23 & 24 Vict. cap. 38, s. 13. (Intestate's Estate.)
23 & 24 Vict. cap. 53, ss. 1 and 2. (Duchy of Cornwall.)
24 & 25 Vict. cap. 62. (Crown and Duchy of Cornwall Amendment Act.)
37 & 38 Vict. cap. 57. (Real Property.)
38 & 39 Vict. cap. 77, Order VIII. s. 1. (Judicature Act, 1875.)
39 & 40 Vict. cap. 37 (Nullum Tempus (Ireland) Act, 1876).

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21 JAMES 1, CAP. 16, SECTS. 3, 4, & 7. (SIMPLE CONTRACTS.)

3. And be it further enacted, That all actions of trespass, quare clausum fregit, all actions of trespass, detinue, action sur trover and replevin, for taking away of goods and cattle, all actions of account, and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors, or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case (other than for

21 Jas. 1, cap. 16.

slander) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action for trespass, quare clausum fregit, within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit, and not after, and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions or suit, and not after, and the said action upon the case for words within one year after the end of this present session of Parliament, or within two years next after the words spoken, and not after.

4. And nevertheless, be it enacted, That if in any the said actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

7. Provided nevertheless, and be it further enacted, That if any person or persons that is, or shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of account, actions of debt, actions of trespass, for assault, menace, battery, wounding, or imprisonment, actions upon the case for words be, or shall be, at the time of any such cause of action, given or accrued, fallen or come within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions so as they take the same within such times as are before limited after their coming to, or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done.

4 ANNE, CAP. 16 (SEAMEN'S WAGES), SECTS. 17, 18, & 19.

17. And be it further enacted, by the authority aforesaid, That all suits and actions in the Court of Admiralty for seamen's wages, which shall become due after the said first day of Trinity term, shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not afterwards.

18. Provided nevertheless, and be it enacted, That if any person or persons who is, or shall be, entitled to any such suit or action for seamen's wages be, or shall be, at the time of any such cause of suit of action, accrued, fallen, or come within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons shall be set at liberty to bring the same actions, so as they take the same within six years next after their coming to, or being of full age, discovert, of sane memory, at large, and returned from beyond the seas.

19. And be it further enacted, by the authority aforesaid, That if any person or persons against whom there is or shall be any such cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, actions for trover or replevin, for taking away goods or cattle, or of action of account, or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding, and imprisonment, or any of them, be, or shall be, at the time of any such cause of suit or action given or accrued, fallen, or come beyond the seas, that then such person or persons, who is, or shall be, entitled to any such suit or action, shall be at liberty to bring the said actions against such person and persons after their return from beyond the seas, so as they take the same after their return from beyond the seas within such times as are respectively limited for the bringing of the said actions before by this Act, and by the said other Act made in the one-and-twentieth year of the reign of King James the First.

9 GEO. 3, Cap. 16.[1] (THE CROWN.)

By the first section of this Act the Crown is disabled to sue or implead any person for any manors, lands, tenements, rents, tithes, or hereditaments where the right had not, or shall not first accrue and grow within sixty years next before commencing suit, unless the same shall have been duly in charge, or stood *insuper* of record, or been answered to the Crown. The second section provides for cases where the rent and profits of such hereditaments shall be duly in charge to the Crown. The third and forth sections provide for and exempt from the operation of the Act reversions in the Crown and grantees of the Crown. The fifth and sixth sections provide for payment of certain services to the Crown and contain a general reservation of the rights of others than the Crown. The seventh section secures to the Crown such fee farm, or other rents as had been paid within a limited time. The eighth and ninth sections contain temporary provisions. The tenth section declares what shall and shall not be deemed a putting in charge, standing *insuper* or taking or answering by or to the Crown within the meaning of the first section.

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9 GEO. 4, CAP. 14 (LORD TENTERDEN'S ACT) SECTS. 1, 2, 3, 4 & 8.[2]

1. Whereas by an Act passed in England in the twenty-first year of the reign of King James the First, it was among other things enacted that all actions of account and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent should be commenced within three years after the then present session of

[1] Extended to the Duchy of Cornwall by 23 & 24 Vict., cap. 53, *infra*, p. 316; and see 24 & 25 Vict., cap. 62, *infra*, p. 316.

[2] See 19 & 20 Vict., cap. 97, s. 13, *infra*, p. 315.

Parliament, or within six years next after the cause of such action or suit and not after: And whereas, a similar enactment is contained in an Act passed in Ireland in the tenth year of the reign of King Charles the First: And whereas, various questions have arisen in actions founded on simple contract as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions and to make provision for giving effect to the said enactments and to the intention thereof: Be it therefore enacted, by the King's most excellent Majesty, by and with the advice and consent of the lords Spiritual and Temporal and Commons in the present Parliament assembled, and by the authority of the same, that in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof unless such acknowledgment or promise shall be made, or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away or lessen the affect of any payment of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such joint contractors or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act, as to one or more of such joint contractors or executors or administrators shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise judgment may be given and costs allowed for the plaintiff as to

9 Geo. 4, cap. 14.

9 Geo. 4, cap. 14.

such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

2. And be it further enacted, that if any defendant or defendants, in any action on any simple contract shall plead any matter in abatement to the effect that any other person or persons ought to be jointly sued and issue be joined on such plea, and it shall appear at the trial that the action could not by reason of the said recited Acts or this Act or either of them, be maintained against the other person or persons named in such plea or any of them, the issue joined on such plea shall be found against the party pleading the same.

3. And be it further enacted, that no indorsement or memorandum of any payment written or made, after the time appointed for this Act to take effect, upon any promissory note, bill of exchange or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of either of the said Statutes.

4. And be it further enacted, that the said recited Acts and this Act shall be deemed and taken to apply to the case of any debt or simple contract alleged by way of set off on the part of any defendant either by plea, notice, or otherwise.

8. And be it further enacted, that no memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any Statute relating to the duties of stamps.

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3 & 4 WM. 4, CAP. 27.[1] (REAL PROPERTY.)

1. Be it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or different meaning, shall in this Act, except where the nature of the provision or the context of the Act, shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" shall extend to manors, messuages,

[1] See 37 & 38 Vict., cap. 57, *infra*.

and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate or interest in them, or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole), and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest, claimed as heir, issue in tail, tenant by the courtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male. 3 & 4 Wm. 4, cap. 27.

2.[1] After the thirty-first day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to the person making or bringing the same.

[1] See the New Act, *infra*, p. 321.

3 & 4 Wm. 4, cap. 27.

3. In the construction of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession, or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in posses-

sion; and when the person claiming such land or rent, or the person through whom he claims shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken. 3 & 4 Wm. 4. cap. 27.

4. Provided always, that when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

5 [1]. Provided also, that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined have been in possession or receipt of the profits of such land, or in receipt of such rent.

6. For the purposes of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

7. When any person shall be in possession, or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, or of the

[1] See the New Act, *infra*, p. 321.

3 & 4 Wm. 4, cap. 27.

person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee.

8. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year, or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent, payable in respect of such tenancy, shall have been received (which shall last happen).

9. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any *rent* (charge) by virtue of a lease in writing by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or *rent* (charge) in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent received by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or *rent* (charge) subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease shall be deemed to have first accrued, at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

10. No person shall be deemed to have been in possession

of any land within the meaning of this Act merely by reason of having made an entry thereon. 3 & 4 Wm. 4, cap. 27.

11. No continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action.

12. When anyone or more of several persons entitled by any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them.

13. When a younger brother, or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

14. Provided always, and be it further enacted, That when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of, or by the person to whom, or to whose agent, such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person or any person claiming through him to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

15. Provided also, and be it further enacted, That when no

3 & 4 Wm. 4, cap. 27.

such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person or the person claiming through him may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest at any time within five years next after the passing of this Act.

16.[1] Provided always, and be it further enacted, That if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned; (that is to say,) infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person or the person claiming through him may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).

17[1]. Provided nevertheless, and be it further enacted, that no entry, distress, or action shall be made or brought by any person who at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole term of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability or have died, shall not have expired.

18. Provided always, and be it further enacted, that when

[1] See the New Act, *infra*, p. 321.

any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry, or distress, or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of twenty[1] years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent shall have first accrued, or the said period of ten[2] years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

19. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any islands adjacent to any of them (being part of the dominions of his Majesty) shall be deemed to be beyond seas within the meaning of this Act.

20. When the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person or any person claiming through him to recover such land or rent in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

21. When the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore

[1] Reduced to twelve years by the New Act, *infra*, p. 321.

[2] Reduced to six years by the New Act, *infra*, Ibid.

3 & 4 Wm. 4, cap. 27.

limited which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

22. When a tenant in tail of any land or rent entitled to recover the same shall have died before the expiration of the period hereinbefore limited which shall be applicable in such case for making an entry, or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred, shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

23 [1]. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof or at any time afterwards be in posession, or receipt of the profits of such land or in the receipt of such rent, and the same person or any other person whatsoever (other than such person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail,) shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance if it had been executed by such tenant in tail, or the person who would have been entitled to his estate tail, if such assurance had not been executed, would without the consent of any other person have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

24. After the said 31st day of December, 1833, no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which by virtue

[1] See the New Act, *infra*, p. 321.

of the provisions hereinbefore contained he might have made an entry, or distress, or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity. 3 & 4 Wm. 4, cap. 27.

25. Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him to bring a suit against the trustee, or any person claiming through him to recover such land or rent, shall be deemed to have first accrued according to the meaning of this Act at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

26. In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such fraud shall be deemed to have first accrued at, and not before, the time at which such fraud shall or with reasonable diligence might have been first known or discovered, provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents on account of fraud against any *bonâ fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time he made the purchase did not know and had no reason to believe that any such fraud had been committed.

27. Provided always, and be it further enacted, that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act.

28[1]. When a mortgagee shall have obtained the possession

[1] See the New Act, p. 321.

3 & 4 Wm. 4, cap. 27.

or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment or the last of such acknowledgments, if more than one was given, and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land, or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors, a right to redeem the mortgage as against the person or persons entitled to any undivided or divided part of the money, or land, or rent; and where such of the mortgagees, or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage or some estate or interest therein, and not to any ascertained part of the mortgage money to mortgagor or mortgagors, shall be entitled to redeem the same divided part of the land or rent on payment with interest of the part of the mortgage money, which shall bear the same proportion to the whole of the mort-

gage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage. 3 & 4 Wm. 4, cap. 27.

29. Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned, next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the time of such two incumbencies, and such term of six years taken together, shall amount to the full period of sixty years, and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said 31st day of December, 1833, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

30. After the said 31st day of December, 1833, no person shall bring any *quare impedit*, or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the time of such incumbencies taken together shall amount to the full period of sixty years, and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with

3 & 4 Wm. 4, cap. 27.

the times of such incumbencies will make up the full period of sixty years.

31. Provided always, and be it further enacted, that when on the avoidance after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty, or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop.

32. In the construction of this Act, every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof by virtue of any estate, interest, or right, which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit*, action, or suit, shall be limited accordingly.

33. Provided always, and be it further enacted, that after the said 31st day of December, 1833, no person shall bring any *quare impedit*, or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share or alternate right of presentation or gift held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title.

34. At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit*, or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished. 3 & 4 Wm. 4, cap. 27.

35. The receipt of the rent payable by any tenant from year to year, or other lessee shall, as against such lessee or any person claiming under him (but subject to the lease) be deemed to be the receipt of the profits of the land for the purposes of this Act.

36. No writ of right patent, writ of right, *quia dominus remisit curiam*, writ of right in *capite*, writ of right in London, writ of right close, writ of right *de rationabili parte*, writ of right of advowson, writ of right upon disclaimer, writ *de rationabilus divisis*, writ of right of ward, writ *de consuetudinibus et servitiis*, writ of *cessavit*, writ of escheat, writ of *quo jure*, writ of *secta ad molendinum*, writ *de essendo quietum de theolonia*, writ of *ne injuste vexes*, writ of *mesne*, writ of *quod permittat*, writ of *formedon indescender in remainder* or *in reverter*, writ of assize of novel disseisin, nuisance, darrein, presentment, *juris utrum*, or *mort d'ancestor*, writ of entry *sur disseisin* in the *quibus*, in the *per*, and *cui*, or in the post writ of entry *sur intrusion*, writ of entry *sur alienation dum fuit, non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium*, or *sur cui ante divortium*, writ of entry *sur abatement*, writ of entry *quare ejecit infra terminum*, or *ad terminum qui præteriit*, or *causa matrimonii prælocuti*, writ of *aiel, besaiel, tresaile, cosinage*, or *nuper obiit*, writ of waste, writ of partition, writ of *disceit*, writ of *quod ei deforceat*, writ of covenant real, writ of *warrantia chartæ*, writ of *curia claudenda*, or writ *per quæ servitia*, and no other action, real or mixed (except a writ of right of dower, or writ of dower *unde nihil habet*, or a *quare impedit*, or an ejectment), and no plaint in the nature of any such writ or action (except a plaint for freebench or dower) shall be brought after the 31st day of December, 1834.

3 & 4 Wm. 4, cap. 27.

37. Provided always, and be it further enacted, that when on the said 31st day of December, 1834, any person who shall not have a right of entry to any land, shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the 1st day of June, 1835, in case the same might if this Act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired.

38. Provided also, and be it further enacted, that when on the said 1st day of June, 1835, any person whose right of entry to any land shall have been taken away by any descent, cast, discontinuance or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said 1st day of June, 1835, but only within the period during which, by virtue of the provisions of this Act, an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away.

39. No descent, cast, discontinuance or warranty which may happen or be made after the 31st day of December, 1833, shall toll or defeat any right of entry or action for the recovery of land.

40.[1] After the said 31st day of December, 1833, no action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage judgment or lien or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy[2] but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent, and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledg-

[1] See the new Act, *infra*, p. 321.

[2] See *infra*, 23 & 24 Vict., cap. 38, s. 13, p. 313.

ment, or the last of such payments or acknowledgments if more than one was given. 3 & 4 Wm. 4, cap. 27.

41. After the said 31st day of December, 1833, no arrears of dower nor any damages on account of such arrears shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

42. After the said 31st day of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears of rent or interest shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent; provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

43. After the said 31st day of December, 1833, no person claiming any tithes, legacy or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceedings in any spiritual court to recover the same, but within the period during which he might bring such action or suit at law or in equity.

44. Provided always, and be it further enacted, that this Act shall not extend to Scotland, and shall not, so far as it relates to any right to permit to or bestow any church vicarage or other ecclesiastical benefice, extend to Ireland.

3 & 4 Wm. 4, cap. 42. 3 & 4 WM. 4, CAP. 42 (SPECIALTIES), SECTS. 3–7.

3. And be it further enacted, that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages or sums of money given to the party grieved by any Statute, now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed and not after; (that is to say,) the said actions of debt for rent upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognisance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved one year after the end of this present session, or within two years after the cause of such actions or suits but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any Statute where the time for bringing such action is or shall be by any Statute specially limited.

4. And be it further enacted, That if any person or persons that is or are or shall be entitled to any such action or suit or to such *scire facias*, is or are or shall be at the time of any such cause of action accrued within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discovert, of sound memory, or returned from beyond the seas, as other persons having no such impediment should according to the provisions of this

Act have done; and that if any person or persons against whom there shall be any such cause of action, is or are or shall be at the time such cause of action accrued beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas. 3 & 4 Wm. 4, cap. 42.

5. Provided always, that if any acknowledgment shall have been made either by writing, signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment, or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment, be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff or plaintiffs in any such action, or any indenture, specialty or recognisance, may by way of replication state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this Statute.

6. And nevertheless be it enacted, That if in any of the said actions judgment be given for the plaintiff and the same be reversed by error, or a verdict pass for the plaintiff and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if in any of the said actions the defendant shall be outlawed and shall after reverse the outlawry, then in all such cases the party, plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed or such judgment given against the plaintiff or outlawry reversed and not after.

3 & 4 Wm. 4, cap. 42.

7. And be it further enacted, That no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any Islands adjacent to any of them, being part of the dominions of His Majesty, shall be deemed to be beyond the seas within the meaning of this Act, or of the Act passed in the 21st year of the reign of King James the First, entituled an Act for limitation of actions and for avoiding of suits in law.

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7 WM. 4 & 1 VICT., CAP. 28 (MORTGAGES).

By this Act[1] it is enacted as follows:—That it shall and may be lawful for any person entitled to, or claiming under any mortgage of land within the definition contained in the first section of the said Act (3 & 4 Wm. 4, c. 27), to make an entry, or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry, or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding.

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16 & 17 VICT., CAP. 113 (C. L. P. AMENDMENT ACT, IRELAND), SECTS. 20–27.

20. All actions for rent upon an indenture of demise, all actions upon a bond or other specialty, or upon any judgment, statute-right, statute-merchant, or recognisance shall be commenced and sued within twenty years after the cause of such actions or suits, or the recovery of such judgments, but not after; all actions grounded upon any lending or contract, expressed or implied, without specialty, or upon any award where the submission is not by specialty or for any money levied by *fieri facias*; all actions of account, or for not accounting, other than for such

[1] See new Act, *infra*, p. 321.

accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions for direct injuries to real or personal property; actions for the taking away or conversion of property, goods, and chattels; actions for libel, malicious prosecution and arrest, seduction, criminal conversation; and actions for all other causes which would heretofore have been brought in the form of action called trespass on the case, except as hereinafter excepted, shall be commenced and sued within six years after the cause of such actions, but not after; and all actions for assault, menace, battery, wounding, and imprisonment, shall be commenced and sued within four years after the cause of such actions, but not after; and all actions for words and for penalties, damages, or sums of money given to the party grieved by any Statute now, or hereafter to be in force, shall be commenced and sued within two years after the words spoken or the cause of such action or suit, but not after; and with respect to every subject matter of a personal action not herein specifically provided for, being the subject matter of a personal action, such actions in respect thereof shall be brought within the same period of limitation now applicable thereto, notwithstanding that such cause of action may be described or expressed in such Statutes by reference to any particular form of action: Provided that nothing in this Act contained shall alter the period of limitation of any action given by any Statute where the time for bringing such action is, or shall be, by any Statute specially limited. 16 & 17 Vict., cap. 113.

21. If in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass, or upon judgment by default damages be assessed for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within the period hereinbefore provided for in such action, or within a year after such judgment reversed, or judgment given against the plaintiff, and not after.

16 & 17 Vict., cap. 113.

22. If any person that is, or shall be entitled to any such cause of action, is, or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, a married woman, of unsound mind, or beyond the seas, then such person shall be at liberty to bring the same action so as to commence the same within such time after the cessation of such disability, or his return from beyond seas, as other persons having no such impediment should, according to the provisions of this Act, have done; and if any person or persons against whom there shall be any such cause of action is, or shall be, at the time such cause of action accrued, beyond seas, then the person entitled to any such cause of action shall be at liberty to bring the same against such person, within such time as is before limited after the return of such person from beyond seas.

23. If any acknowledgment shall have been, or shall be made, either by writing signed by the party liable by virtue of any indenture, specialty, judgment, statute-staple, or statute-merchant, or recognisance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall be lawful for the person entitled to bring his action for the money remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment, or part satisfaction as aforesaid, or in case the person entitled shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff in any such action on any indenture, specialty, judgment, statute-staple, or statute-merchant, or recognisance, may rely on such acknowledgment and that such action was brought within the time aforesaid in answer to a plea of the Statute.

24. In actions grounded upon any simple contract no acknowledgment or promise shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of

the operation of the provisions of this Act in relation to the limitation of actions, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and where there shall be two or more joint contractors or executors of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of this Act, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away the effect of any payment of any principal or interest made by any person whomsoever. 16 & 17 Vict., cap. 113.

25. No endorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing by or on behalf of the party to whom such payment shall be made shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the provisions of this Act in relation to the limitation of actions.

26. This Act shall be deemed and taken to apply to the case of any debt alleged by way of set off on the part of any defendant.

27. No memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any Statute relating to the duties on stamps.

MERCANTILE LAW AMENDMENT ACT (19 & 20 VICT., CAP. 97), SECTS. 9–16.

9. All actions of account, or for not accounting, and suits for such account as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen, then within six years of the passing of this Act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by

19 & 20 Vict., cap. 97.

action or suit, by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

10. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the act of the twenty-first year of the reign of King James the First, chapter sixteen, section three, or by the Act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the Act of the fifty-third year of the reign of King George the Third, chapter one hundred and twenty-seven, section five, or by the Acts of third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one, and forty-two, and chapter forty-two, section three, or by the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid by reason only of such person or some one or more of such persons being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.

11. Where such cause of action or suit, with respect to which the period of limitation is fixed by the enactments aforesaid or any of them, lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond the

seas at the time the cause of action or suit accrued, after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid. 19 & 20 Vict., cap. 97.

12. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of Her Majesty, shall be deemed to be beyond seas within the meaning of the Act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen, or of this Act.

13. In reference to the provisions of the Acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

14. In reference to the provisions of the Acts of the 21st year of the reign of King James the First, chapter sixteen, section three, and of the Act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three, and of the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, when there shall be two or more contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors, or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal interest or other money by any other or others of such co-contractors or co-debtors, executors, or administrators.

15. In citing this Act, it shall be sufficient to use the expression, "The Mercantile Law Amendment Act, 1856."

16. Nothing in this Act shall extend to Scotland.

24 & 25 Vict., cap. 62.

23 & 24 VICT., CAP. 38 (INTESTATE'S ESTATE), SECT. 13.

13. This section, after reciting the 3 & 4 Wm. 4, c. 27, s. 40, enacts that after the thirty-first day of December, 1860, no suit or other proceeding shall be brought to recover the personal estate of any person dying intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given.

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23 & 24 VICT., CAP. 53 (DUCHY OF CORNWALL ACT), SECTS. 1 & 2.

By section 1 of this Act all the provisions of the Act 9 Geo. 3, c. 16, as to limitation of actions and suits are extended to the Duke of Cornwall, subject to the provisions of certain previous Acts affecting the duchy.

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24 & 25 VICT., CAP. 62 (THE CROWN AND DUCHY OF CORNWALL AMENDMENT ACT).[1]

By section 1 of this Act the Crown is not to sue after by reason of the lands having been in charge or stood insuper of record.

[1] See 39 & 40 Vict., cap. 37, *infra*, p. 323.

By section 2 a similar provision is made as to the rights of the Crown in respect of the Duchy of Cornwall. 24 & 25 Vict., cap. 62.

By the 3rd section provision is made as to the effect of answering of rents to the Crown.

The 4th section contains a reservation of reversionary interests in the Crown and Duke of Cornwall.

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37 & 38 VICT., CAP. 57 (REAL PROPERTY LIMITATION ACT, 1874).

An Act for the further Limitation of Actions and Suits relating to Real Property.

Whereas it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon :

Be it enacted, by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows :—

1. After the commencement of this Act no person shall make an entry or distress, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit, shall have first accrued to some person through whom he claims ; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

2. A right to make an entry or distress, or to bring an action or suit to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion or remainder, or other future estate or interest at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held or the profits thereof, or such rent shall have been received, notwithstanding the

37 & 38 Vict., cap. 57.

person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent. But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent, in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit to recover such land or rent.

3. If at the time at which the right of any person to make an entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned; that is to say, infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years or six years (as the case may be) hereinbefore limited shall have expired, make an entry or distress, or bring

an action or suit to recover such land or rent at any time within six years next after the time at which the person to whom such right shall have first accrued shall have ceased to be under any such disablity, or shall have died (whichever of those two events shall have first happened). 37 & 38 Vict., cap. 57.

4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not, in any case, after the commencement of this Act, be extended or enlarged by reason of the absence beyond seas during all or any part of that time, of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims.

5. No entry, distress, action or suit, shall be made or brought by any person who, at the time at which his right to make any entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died shall not have expired.

6. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates, to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in receipt of such rent, and the same person, or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate, which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail, if such assur-

37 & 38 Vict., cap. 57.

ance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right, to take effect after or in defeasance of such estate tail.

7. When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor, or person signed by the mortgagee, or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors, or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage-money, or land, or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; and where such

of the mortgagees or persons aforesaid as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage-money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage-money, which shall bear the same proportion to the whole of the mortgage-money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage. 37 & 38 Vict., cap. 57.

8. No action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto, shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action, or suit, or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given.

9. From and after the commencement of this Act, all the provisions of the Act passed in the session of the third and fourth years of the reign of his late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, and twenty-eight, and forty respectively (which several sections from and after the commencement of this Act shall be repealed) and as if the term of six

37 & 38 Vict., cap. 57.

years had been mentioned instead of the term of ten years in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the Act passed in the session of the seventh year of the reign of his late Majesty King William the Fourth, and the first year of the reign of her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

10.[1] After the commencement of this Act, no action, suit or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any trust.

11. This Act may be cited as the "Real Property Limitation Act, 1874."

12. This Act shall commence and come into operation on the first day of January, one thousand eight hundred and seventy-nine.

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38 & 39 VICT., CAP. 77 (THE SUPREME COURT OF JUDICATURE ACT, 1875), ORDER VIII., SECT. 1.

1. No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date, but if any defendant therein shall not have been served therewith the plaintiff may, before the expiration of the twelve months, apply to a judge, or the district registrar, for leave to renew the writ; and the judge or registrar, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the

[1] This section is intended to set at rest the doubtful question as to charges on land. See *supra*, p. 189.

original or concurrent writ of summons be renewed for six months from the date of such renewal, and so from time to time during the currency of the renewed writ. And the writ shall, in such case, be renewed by being marked with a seal bearing the date of the day, month and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer upon delivery to him by the plaintiff, or his solicitor, of a Memorandum in Form No. 5 in Appendix (A), Part 1; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any Statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons. 38 & 39 Vict., cap. 77.

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39 & 40 VICT., CAP. 37 (NULLUM TEMPUS (IRELAND) ACT, 1876).

Whereas by an Act passed in the twenty-fourth and twenty-fifth years of her Majesty, certain provisions were made for the better quieting possessions and titles against the Crown in England, and it is expedient to extend these provisions to Ireland, in order that the Crown shall have no greater right over the estates of its subjects in Ireland than what it enjoys over the estates of its subjects in England:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

1. The Queen's Majesty, her heirs and successors, shall not at any time hereafter, sue, impeach, question, or implead any person or persons for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises), which such person or persons, or his or their, or any of their ancestors or predecessors, or those from, by, or under whom they do or shall claim, have, or shall have held, or enjoyed, or taken the rents, revenues,

39 & 40 Vict., cap. 37.

issues, or profits thereof, by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit, or proceedings as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, by reason only that the same manors, lands, tenements, rents, tithes, or hereditaments, or the rents, revenues, issues, or profits thereof, have, or shall have been in charge to her Majesty, or her predecessors, or successors within the said sixty years, but that such having been in charge shall be as against such person and persons, and all claiming by, from, and under them, or any of them, of no force or effect.

2. The Queen's Majesty, her predecessors, and successors, shall not be held, deemed, or taken for the purpose of any suit, bill, plaint, information, commission, or other proceeding, to have been answered, the rents, revenues, issues, or profits of any lands, manors, tenements, rents, tithes, or hereditaments, which shall have been held or enjoyed, or of which the rents, revenues, issues, or profits shall have been taken by any other person or persons by the space of sixty years next before the filing, issuing or commencing of any such action, suit, bill, plaint, information, commission, or other proceeding for recovering the same, or in respect thereof, by reason only of the same lands, manors, tenements, rents, tithes, or hereditaments having been part or parcel of any honour, or manor, or other hereditaments, of which the rents, revenues, issues, or profits shall have been answered to her Majesty, her predecessors or successors, or some other person under whom her Majesty, her predecessors, or successors hath or lawfully claimeth, or shall hereafter have or lawfully claim as aforesaid, or of any honour, manor, or other hereditaments which shall have been duly in charge to her Majesty, her predecessors, or successors, as aforesaid.

3. In the construction of the Act passed in the forty-eighth year of the reign of his late Majesty King George the Third, chapter forty-seven, and of this Act, the right or title of the Queen's Majesty, her heirs, or successors, to any manors, lands, tenements, rents, tithes, or hereditaments which are now, or

shall at any time hereafter, be subject to or comprised in any demise or lease for any term or terms of years, or for any life or lives granted by or on behalf of her Majesty, or any of her Royal predecessors, or successors, shall not be deemed to have first accrued or grown until the expiration or determination of such demise or lease, as against any person or persons whose possession, holding, or enjoyment of such manors, lands, tenements, rents, tithes, or hereditaments, or whose receipt of the rents, issues, or profits thereof shall have commenced during the term of such demise or lease, or who shall claim from, by, or under any person or persons whose possession, holding, or enjoyment of such manors, lands, tenements, rents, tithes, or hereditaments, or whose receipt of the rents, issues, or profits thereof shall have so commenced as aforesaid. 39 & 40 Vict., cap. 37.

4. Nothing contained in this Act shall extend to any action, bill, plaint, information, commission, or other suit or proceeding instituted or commenced before the passing of this Act, and now pending.

5. This Act may be cited as "The Nullum Tempus (Ireland) Act, 1876," and shall be read and construed with the Act for quieting possessions and confirming defective titles in Ireland, passed in the forty-eighth year of his Majesty King George the Third.

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